THE NORTHERN IRELAND LAW REPORTS

1937

THE

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IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

MARCUS D. BEGLEY,

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Lords Justices of Appeal:

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THE RIGHT HON. RICHARD BEST.

Chancery Division:

THE HON. ROBERT DICK MEGAW.

King's Bench Division:

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DETERMINED BY

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THE COURT OF APPEAL

IN

NORTHERN IRELAND.

CURRY v. REA (1).

C.A. 1936.

Jan. 27, 29. April 22, 29. June 18.

Detinue of Title Deeds—Solicitor's Lien for Costs—Waiver—Mortgage—Whether Lien merged in Mortgage—Statute of Limitations—(37 & 38 *Vic.*, *c.* 57).

In an action for detinue of title deeds the defendant pleaded a lien for costs and moneys advanced and, alternatively, a right to detain the documents as mortgagee. The plaintiff replied that the alleged debt and mortgage were barred by the Statute of Limitations.

The trial judge held that there was a debt due to the defendant, and that the defendant was entitled to hold the documents as lien for such debt. He did not consider any question relative to the mortgage as he was of opinion that no mortgage had been proved or handed in, and he had refused at the close of the case to allow it to be included in the plaintiff's list of proofs.

The plaintiff appealed to the Court of Appeal, seeking to have the judgment of the trial judge set aside on the ground, amongst others, that the trial judge failed to give proper consideration to the argument that the lien had become merged in the mortgage.

There were several further references to the mortgage in the report.

In addition there were two affidavits filed in proceedings between the present defendant as plaintiff and the present plaintiff's father as defendant. Both these affidavits were put in evidence on defendant's cross-examination at the trial. In one of them the

(1) In the Court of Appeal before Andrews and Best, L.JJ., and Megaw, J.

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mortgage was duly exhibited, and in the other the due execution of the mortgage was deposed to.

No intention to reserve his lien was explained by the defendant to the plaintiff's father, E. C.

Held, by the Court of Appeal (Andrews and Best, L.JJ., and Megaw, J.), (Andrews, L.J., dubitante), that the mortgage must be taken to have been sufficiently proved, and that the failure to produce the original deed and to have it marked at the proper time was a mere technical irregularity which should not be allowed to operate so as to create an injustice;

Held, *also*, that the Court was entitled to consider the issue of waiver of the lien;

Held, *also*, that when the defendant took his mortgage, not having made known any intention to retain the security of his lien, he must be regarded as having waived such lien, and nothing had appeared which could have the legal effect of reviving it;

Held, by Best, L.J., that both the defendant's mortgage debt and his interest in the lands comprised in the mortgage had been extinguished by the operation of the Statute of Limitations;

Held, by Andrews, L.J., that the mortgage debt was not barred, although the defendant's interest in the lands had been extinguished;

Held, *further*, by Andrews, L.J., that it was unnecessary for the plaintiff to establish that the debt was actually extinguished, but that it was sufficient for him to show that the lien was merged and lost in the mortgage;

Held, by the whole Court, that the plaintiff was entitled to succeed and that an order for the delivery up of the title deeds to him should be made.

APPEAL from an order of Brown, J., sitting as a judge without a jury, in an action for the detinue of title deeds and other documents, when he directed that judgment should be entered for the defendant.

The plaintiff claimed the return of certain documents of title. He alleged that these documents were his property and that the defendant had wrongfully detained and converted them to his own use, and he also claimed damages for their detention.

The defendant, a solicitor, sought in his defence to justify his detention by an alleged lien for costs and moneys advanced. Alternatively, he claimed a right to detain the documents sued for, as mortgagee under an indenture of mortgage, dated 25th November, 1910, made between George Curry, father of the plaintiff, of the one part, and the defendant, of the other part.

In answer to these defences, the plaintiff pleaded that the alleged debt of the costs and moneys was before the commencement of the action, barred by the Statute of Limitations, and that the alleged debt and the alleged mortgage were by the same statute likewise barred before the commencement of the action.

The defendant, as a solicitor, had carried through for George Curry, father of the plaintiff, certain legal transactions in the year 1901, and in the following year became possessed of the documents referred to, which documents he had held ever since.

The defendant alleged that on 25th November, 1910, George Curry executed a mortgage of certain lands in County Tyrone to secure the payment of two sums, (*a*) one of £76 for costs, charges and expenses incurred by the defendant as solicitor for George Curry, and (*b*) a sum of £81 9*s*. 9*d*. being moneys advanced to George Curry by the defendant, making together the sum of £157 9*s*. 9*d*. The money, or any part thereof, whilst still unpaid was to bear interest at the rate of £5 per cent. per annum. In addition to the mortgage security there was a personal covenant by George Curry to pay the sum just mentioned. From the date of the execution of the mortgage there had been no payment of principal or interest, and there had been no acknowledgment either by George Curry or by the plaintiff which would keep the mortgage security or the debt alive.

On 18th November, 1922, one week before twelve years had elapsed from the date of the execution of the mortgage, the defendant caused an originating summons to be issued out of the Chancery Division of the High Court of Justice in Northern Ireland, against George Curry, claiming to have the amount of his mortgage debt raised in the usual way, and on 18th December, 1922, Wilson, J., made an Order declaring that the sum secured by the mortgage with interest was well charged on George Curry's interest in the lands the subject of the mortgage, and granting to John J. Rea, the plaintiff in the summons, the usual relief.

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In an affidavit made by John J. Rea, on 24th November, 1922, on which the application for relief was grounded, he swore that George Curry had by the indenture of mortgage conveyed to him these lands, and the original indenture of mortgage was made an exhibit to the affidavit.

An appeal was taken from the order of Wilson, J., to the Court of Appeal, and that Court by an order, dated 15th February, 1923, reversed the order of Wilson, J., on the ground that as George Curry, in an affidavit sworn by him and used before Wilson, J., had maintained that he never executed a mortgage in favour of John J. Rea, and that if he had executed a document purporting to be a mortgage he was not aware that it was of that nature, and as the fact of the execution of the mortgage was disputed that matter could not be decided on an originating summons. In reversing the order of Wilson, J., the Court of Appeal gave leave to John J. Rea to institute a plenary suit in respect of the mortgage, and put the defendant, George Curry, under terms in that suit, not to plead the Statute of Limitations, which, but for the issue of the originating summons, had run in his favour.

No plenary suit was ever instituted by John J. Rea, and the mortgage security and the debt had long since become barred.

Both these affidavits were put in evidence on defendant's cross-examination at the trial of the present action.

The trial judge stated in his report that the matter before him was whether there was in fact any debt due to the defendant. He found as a fact that there was such a debt, and he held that the defendant was entitled to hold the documents as lien for such debt.

The trial judge also stated that he found as a fact that the debt was due and unpaid, and that the documents were held under a good lien. He did not, he continued, consider any question relative to the mortgage as no mortgage had been proved or handed in, and he refused at the close of the case to allow the mortgage to be included in the plaintiff's list of proofs.

The cross-examination of plaintiff's solicitor contained the statement that "plaintiff does not admit the "execution of the mortgage." It was, however, set out in the judge's report that at the close of the plaintiff's direct examination the Attorney-General entered documents 1 to 35, of which No. 29 was the mortgage. The report contains several references to the mortgage. In the defendant's direct evidence, it was stated, that "A mortgage was executed on 25th "November, 1910; Mr. Curry got a copy of this (a Bill "of Costs) before the mortgage was executed;" and again, "Costs were included in mortgage."

The plaintiff moved to have the judgment set aside on the grounds: (*a*) that the trial judge misdirected himself in holding that the defendant had a lien on the documents of title, and in holding that the defendant had such a claim against the plaintiff as enabled him to retain these documents under such lien; that the trial judge failed to give proper consideration to the argument that the lien had become merged in the mortgage, and to the argument that such a time had elapsed since the date when the debt became due and since the mortgage was executed, that the debt and mortgage were barred.

The *Attorney-General* (*A. B. Babington, K.C.*) and *B. Maginess* for the plaintiff:—

We submit that the costs and other liabilities of George Curry to the defendant have been discharged. The only debt that could exist would be the portion of the consideration for the mortgage which represented costs. There can be no solicitor's lien except in respect of costs. The onus is on the defendant to show that he has a good common law lien.

We submit that the rule established in *In re Taylor, Stileman and Underwood* (1) applies to the present case. In that case it was held by the Court of Appeal in England that whether the taking of security by a person having a lien is an abandonment of the lien depends on the intention, whether expressed or to be

(1) [1891] 1 Ch. 590.

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gathered from the circumstances of the case, and that *prima facie*, where a solicitor whose duty it is to advise his client as to his rights and liabilities takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is abandoned.

We rely on *In re Morris* (1), where it was held that where a solicitor takes any security for his general costs which is inconsistent with the retention of his general lien, since it gives him some special advantage which the enforcement of the payment of his costs by the exercise of his right of lien would not give, that lien is gone unless he gives the client express notice of his intention to retain the lien. In that case, Kennedy, L.J., said in his judgment : " In view of the " peculiar position which a solicitor occupies in relation " to his client, and of the public importance, which the " law recognises, of maintaining the obligations of " that relation in their integrity, I should be inclined " to hold that, if, when taking from his client any " security for costs generally, a solicitor intends to " retain the security of his lien, he ought not to be " silent, but, either by express words or by necessary " implication to make that intention known to his " client ; and that if he fails to prove such a reservation " he ought, whatever be the nature of the security he " takes, to be treated as having waived or abandoned " his right of lien."

The defendant cannot be allowed to set up the two alternative cases of mortgage and lien.

We contend that the mortgage debt is extinguished.

It is for the defendant to show that he holds the deeds under some claim of right.

Once the mortgage is extinguished the mortgagor holds the lands as he held them before.

The present case comes within Lord Tenterden's dictum in *Harrington v. Price* (2) that whoever is entitled to the land has also a right to all the title deeds affecting it.

The defendant lost his lien for he took a higher security for a simple contract debt.

We submit that the debt itself is gone.

(1) [1908] 1 K.B. 473. (2) 3 B. & Ad. 170, 173.

The mortgage is bad, but so far as it affects the present proceedings it must be considered as good.

No justification for withholding the deeds has been made out.

The mortgage was put in evidence at the trial.

When the defendant took his mortgage he waived his possessory lien which in law became merged in the mortgage. Both the defendant's mortgage debt and his interest in the lands comprised in the mortgage have become extinguished by the operation of the Statutes of Limitation.

There is no evidence to show that the defendant when taking the mortgage made known to his client either by express words or necessary implication his intention to retain the security of his lien.

It is unnecessary for the plaintiff to establish that the debt was extinguished, it is enough to show that the lien was lost and merged in the mortgage.

We submit that the trial judge should have held that the plaintiff was entitled to the return of these title deeds.

[They also referred to *Sutton v. Sutton* (1), and *Beamish v. Whitney* (2).]

Murphy, K.C., Lowry, K.C. and *McCoy* for the defendant :—

The Statute of Limitations does not apply to a claim for lien.

We submit that the law is correctly stated in *Halsbury's Laws of England*, Volume 19, page 3, as follows : " A lien is a right of defence, not a right of " action, and consequently can be claimed in respect " of a statute barred debt," see *Higgins v. Scott* (3).

The defendant has a perfectly good solicitor's lien for the costs due to him.

The plaintiff seeks to get rid of this common law lien by setting up a mortgage. This mortgage was never produced at the hearing. The question is, was this mortgage put in evidence in this action ? As to this

(1) 22 Ch. D. 511.
(2) [1909] 1 I.R. 360.
(3) 2 B. & Ad. 413.

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the trial judge's statement in his report that no mortgage had been proved or handed in at the trial, must be conclusive.

We submit there has been no merger of the common law lien.

As to the question arising under the Statutes of Limitation, we rely on *Taylor v. Twinberrow* (1). It was decided in *Courtnay v. Williams* (2) that an executor is entitled to set off against a legacy a debt due from the legatee to the testator, though such debt may have been barred by the statute before the testator's death.

The debt was found to be due and the lien was found to be good, therefore the defendant must succeed.

We submit that the mortgage cannot be good for one purpose and bad for all other purposes.

The defendant has done nothing wrong in retaining possession of the deeds.

The plaintiff would only be entitled to the deeds if he were the owner of the title to which the deeds relate, and there was no debt due by him.

A very simple remedy was available to the plaintiff, he could have gone before the Land Commission and have got a side bar order when the whole matter would have been determined.

The words used by the Vice-Chancellor in *Breslin v. Hodgens* (3) establish that the debt is not extinguished.

McDonnell v. Fitzgerald (4) does not in any way affect the principle that the debt was not extinguished. There is the clearest possible distinction between *Harrington v. Price* (5) and the present case.

We submit that the defendant is in lawful possession of these title deeds, and is entitled to remain in possession until his debt is paid.

When the judgment of Ross, J., in *Beamish v. Whitney* (6) is read carefully it will be seen that the statement that section 8 of the Real Property Limitation Act of 1874 "wipes out the debt" is not to be taken in the wide sense in which it is sought to be construed on behalf of the plaintiff. If it is to be taken in this wide sense, we submit it is bad law.

(1) [1930] 2 K.B. 16.
(2) 15 L.J.Ch. 204.
(3) I.R. 10 Eq. 260.
(4) [1897] 1 I.R. 556.
(5) 3 B. & Ad. 170.
(6) [1909] 1 I.R. 360, 366.

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We submit the present appeal should be dismissed. [They also referred to *Coppinger v. Norton* (1), *Tichborne v. Weir* (2), *In re Powers, Lindsell v. Phillips* (3) and *Knight v. Bowyer* (4).

Cur. adv. vult.

ANDREWS, L.J.

June 18.

ANDREWS, L.J.: This is an action for detinue of title deeds and other documents. The defendant, who is a solicitor, sought in his defence to justify his detention by an alleged lien for costs and moneys advanced; and, alternatively, he claimed a right to detain the documents sued for as mortgagee under an indenture of mortgage, dated 25th November, 1910. Upon this defence the plaintiff joined issue, and pleaded that the alleged debt and mortgage were barred by the Statute of Limitations.

Brown, J., who tried the case without a jury, states in the introductory part of his report, that the matter before him was whether there was in fact any debt due to the defendant. He says that he found as a fact that there was such a debt, and he held that the defendant was entitled to hold the documents as a lien for such debt. After setting out the evidence, the learned judge concludes his report by repeating that he found as a fact that the debt was due and unpaid, and that the documents were held under a good lien. He adds that he did not consider any question relative to the mortgage as no mortgage had been proved or handed in.

These latter words in reference to the mortgage were obviously directed to the plaintiff's notice of motion to this Court which sought to have the judgment of Brown, J., set aside on the ground (amongst others) that the learned judge failed to give proper consideration to the argument that the said lien had become merged in the mortgage.

The case is, in my opinion, one of considerable difficulty both upon its facts and upon the legal issues involved. The facts are to be found partly in the oral evidence of the witnesses at the trial, and partly in the

(1) [1902] 2 I.R. 232.
(2) 67 L.T. 735.
(3) 30 Ch.D. 291.
(4) 27 L. J. Ch. 520.

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ANDREWS, L.J.

affidavits and other documents which were put in evidence, some of them perhaps somewhat irregularly, at the trial. It would appear that from about the year 1902 until the year 1922 the defendant acted as solicitor for the plaintiff's father, George Curry, who died in the year 1928. As such solicitor he did work in respect of which he became entitled to a substantial sum for costs. The plaintiff's case was that these costs and other liabilities of George Curry to the defendant were discharged; whilst the defendant, on the other hand, alleged that they still remain unpaid. This was the issue fought before Brown, J., and determined by him in favour of the defendant. This finding upon a pure question of fact amply supported by evidence has not been challenged, and, indeed, could not have been successfully challenged before us. Doubt was expressed before us as to whether in finding "*the* debt due and "unpaid" the learned judge was referring only to the costs or to the larger sum of £157 9*s.* 9*d.* referred to in the mortgage and defence. On this point I prefer not to express any definite opinion. It was really unnecessary for the judge to ascertain and state the precise amount of the debt. He was entitled to find for the defendant, as he did, if he was satisfied of the existence of *a* debt, and of a valid and subsisting lien in respect thereof.

Now, assuming the existence of an indebtedness for costs and the possession by the defendant of the plaintiff's documents, which would ordinarily give rise to a right of lien, it became incumbent on the plaintiff to show the existence of special circumstances which either prevented such right arising or determined it. It was for this reason that the plaintiff's counsel relied upon the mortgage alleged to have been executed by the plaintiff's father to the defendant on 25th November, 1910, his argument being that the lien had become merged in the mortgage.

It is in connection with this mortgage that my first and principal difficulty arises. Such difficulty is really twofold in character:—(1) Was the mortgage of 25th November, 1910, properly in evidence? and (2) If so, should the issue of waiver of the lien or its

merger in the mortgage be considered by us, having regard to the pleadings and the course of the trial ?

On the first of these issues I naturally attach the greatest possible weight to the report of Brown, J., that no mortgage had been proved or handed in at the trial, and also to his definite refusal at the close of the case to allow it to be included in the plaintiff's list of proofs. In addition to this, the cross-examination of plaintiff's solicitor, Mr. Orr, contains the statement that " plaintiff does not admit the execution of the " mortgage." On the other hand, it is set out in the report that at the close of the plaintiff's direct examination the Attorney-General entered documents 1 to 35, of which No. 29 was the mortgage in question. Further, the notes contain more than one reference to the mortgage. Thus, in the defendant's direct evidence we find : " A mortgage was executed on 25th November, 1910 ; " " Mr. Curry got a copy of this (a Bill of Costs) " before the mortgage was executed ; " and again " Costs were included in mortgage." Such reference to the contents of a written document would be wholly irregular if the document were not produced and put in evidence. Finally, an affidavit made by and filed on behalf of the defendant on 30th November, 1922, in certain proceedings then instituted by originating summons between the present defendant as plaintiff and the present plaintiff's father as defendant, duly exhibited the mortgage, and this affidavit was put in evidence on defendant's cross-examination at the trial, as was also a further affidavit made by the present defendant in the same proceedings which was filed on 18th December 1922, and in which the due execution of the mortgage was deposed to.

In these conflicting circumstances, but not without considerable misgivings, I have come to the conclusion that the mortgage must be taken to have been sufficiently proved, and that the failure to produce the original deed and to have it marked at the proper time was a mere technical irregularity and oversight which should not be allowed to operate so as to produce an injustice.

I now pass to the second question—should the merger issue be entertained by us ? I do not hesitate

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ANDREWS, L.J.

to admit that on the first argument of this case in our Court I formed the opinion that it should not be entertained, as it was not raised in the pleadings, and, indeed, the only reference to the mortgage in the pleadings was contained in an alternative plea in the defence which was not relied upon at the trial. My opinion has, however, been somewhat modified both by the fact that it is not shared by my colleagues, and also because we were assured by the Attorney-General on the second argument that he had himself raised the issue (apparently without objection) in his opening speech at the trial, which was in fact the only speech made on behalf of the plaintiff. If this be so, we ought not now to deprive the plaintiff of the right to raise the issue; but, this must be borne in mind on the question of costs. If parties are to be allowed to argue and succeed upon issues not raised in the pleadings without amendment or penalty of any kind, the sooner pleadings are abandoned as both worthless and misleading the better it will be for the administration of justice. I enter a strong personal protest against the growth of this regrettable practice.

Assuming, however, the issue to be open to the plaintiff, I proceed to consider the proposition for which the Attorney-General contended when the matter was first argued before us. This was that when the defendant took his mortgage he waived his possessory lien, which in law became merged in the mortgage, and that both the defendant's mortgage debt and his interest in the lands comprised in the mortgage have since been extinguished by the operation of the Statutes of Limitation.

There are two limbs to this argument. As to the first, the leading case is *In re Taylor, Stileman and Underwood* (1). At p. 597 Lindley, L.J., stated the law thus: "Whether a lien is waived or not by taking "a security depends upon the intention expressed or "to be inferred from the position of the parties and all "the circumstances of the case. In this particular "instance we are dealing with a solicitor and his client. "It strikes me that if a solicitor takes from his client

(1) [1891] 1 Ch. 590.

"such a security as this solicitor took, the *primâ facie* "inference is that he waives his lien. That appears "to me the right and proper conclusion to come to, "bearing in mind that it is the solicitor's duty to "explain to his client the effect of what he is about "to do." Again, at p. 598, Lopes, L.J., said: "I do "not mean to say that taking a security necessarily "imports an abandonment of the lien; but if there "are circumstances in the taking of the security which "are inconsistent with the continuance of the old "security, it is to be inferred that the solicitor intended "to abandon his lien." Finally, Kay, L.J., expressed himself thus: "A solicitor has a duty to perform "towards his client to represent to his client all the "facts of the case in a clear and intelligible manner "and to inform him of his rights and liabilities; and, "where you find a solicitor dealing with his client "and taking from him such a security as was given "in this case, not expressly reserving his right of lien, "I quite agree that the inference ought to be against "the continuance of the lien."

The view of the law, as so expressed, is not in my opinion qualified in any way by *In re Douglas Norman & Co.* (1), or *In re Morris* (2). Indeed, Lord Alverstone, C.J., re-affirms in the latter case that when a solicitor takes any security which is in any degree inconsistent with the retention of a lien, it is his duty to give express notice to the client if he intends to retain the lien, and that, should he not do so, his lien will be taken to be abandoned.

Now, in the present case, there is no evidence to show that either by express words or necessary implication did the defendant, when taking the mortgage, make known to his client his intention to retain the security of his lien; and such lien must, in my opinion, be regarded as having been absolutely waived or abandoned.

As to the second limb of the learned Attorney-General's argument—that both the defendant's mortgage debt and his interest in the lands comprised in the mortgage have been extinguished by the operation

(1) [1898] 1 Ch. 199. (2) [1908] 1 K.B. 473.

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of the Statute of Limitations—I have two observations to make. In the first place I regret that I differ from my colleague, Best, L.J., in my view that the mortgage debt is not extinguished, though we agree that the defendant's interest in the lands is extinguished. In my opinion the Statutes of Limitation merely bar the personal remedy on the covenant without extinguishing the debt. In support of this view I refer to section 8 of The Real Property Limitation Act, 1874, and contrast its language with that of section 34 of The Real Property Limitation Act, 1833, which in express terms extinguishes the title to the lands. I also refer to the judgment of Byrne, J., in *In re Clifden* (1), followed by Barton, J., in *Beamish v. Whitney* (2), and acted upon by the Court of Appeal in *Lloyd deca.—Waters v. Lloyd* (3). Clearest of all, however, is the judgment of Romer, J., in *Kibble v. Fairthorne* (4), and I would only add that I find no inconsistency whatever between the view which I have expressed and the case of *Sutton v. Sutton* (5), which was so strongly pressed upon us during the argument.

I have, however, come to the conclusion that, as the learned Attorney-General contended on the second hearing, it is quite unnecessary for him to establish that the debt was actually extinguished. It is enough for the plaintiff to show that the lien originally possessed by the defendant was merged and lost in the mortgage. The character of the defendant's possession of the deeds after that date was as mortgagee. When the mortgage became statute-barred and the defendant's interest in the lands was extinguished, the plaintiff became in law the owner of the lands freed from the mortgage, and the defendant had no right to retain the deeds as against him unless he could show that in some way or other the lien revived. No authority has been cited to show that any such revivor of lien automatically arises in such circumstances, and I am satisfied that no such authority exists. In my opinion the revivor of such a solicitor's lien would at least

(1) [1900] 1 Ch. 774.
(2) [1908] 1 I.R. 38.
(3) [1911] 1 I.R. 153, 164.
(4) [1895] 1 Ch. 219, 224.
(5) 22 Ch. D. 511.

require evidence of as clear an intimation to his client of his intention to assert his right to the lien as I have shown to be required from him if he wishes to retain the lien when accepting a higher security such as a mortgage. I say that this "at least" would be required, for I am not satisfied that even this would necessarily suffice in the present case, in which the debt for costs lost its character and identity as such when it became part of the larger sum of £157 9*s.* 9*d.* for which the mortgage of 25th November, 1910, was given.

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On the whole, therefore, in a case which, I repeat, is in my opinion by no means free from doubt, I agree with the other members of the Court that the plaintiff is entitled to succeed, and that an order for delivery up of the title deeds to him should be made.

I confess to a natural reluctance to uphold a defence based upon the Statute of Limitations unless compelled by law to do so; but the defendant has really only himself to blame for the situation which has arisen. He should have asserted his rights, if he believed them to exist, when, by Order of this Court, dated 15th February, 1923, he was granted liberty to proceed by plenary action, and when, by reason of the undertaking embodied in the Order, he would not have been required to meet a plea of the Statute of Limitations. His continuous neglect to answer or even acknowledge receipt of repeated demands for the deeds has also naturally prejudiced his case in the eyes of the Court.

The appeal must be allowed.

We have carefully considered the matter of costs.

Having regard to the form of the pleadings, to the fact that plaintiff has failed upon certain issues, to the course of the trial and all the circumstances of the case, we are of opinion that the plaintiff should receive only two-thirds of his costs of action including the costs of this appeal.

BEST, L.J.

BEST, L.J.: The plaintiff in this case claims the return of certain documents of title, his property, which he says the defendant has wrongfully detained and converted to his own use, and also damages for the

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detention thereof. The defence to the action is two-fold: That the documents are detained by virtue of a solicitor's lien for costs and moneys advanced to the plaintiff's predecessor in title on the 25th day of November, 1910, and, alternatively, that the documents are held by the defendant as mortgagee under a mortgage of that date made between George Curry of the one part and the defendant of the other part. In answer to these defences plaintiff pleads that the alleged debt of the costs and moneys was before the commencement of the action barred by the Statute of Limitations 37 & 38 Victoria, c. 57, and that the alleged debt and the alleged mortgage were by the same Statute likewise barred before the commencemen of the action. The defendant as a solicitor had carried through for George Curry, father of the plaintiff, certain legal transactions in the year 1901, and in the following year became possessed of the documents, or most of the documents in question, for the mortgage deed of 1910 was not then in existence, which documents he has held ever since and which he still claims to hold. The defendant alleges that on 25th November, 1910, George Curry executed a mortgage of certain lands in County Tyrone to secure the payment of two sums (*a*) one of £76 for costs, charges and expenses incurred by the defendant as solicitor for George Curry, and (*b*) a sum of £81 9*s*. 9*d*. being moneys advanced to the said George Curry by the defendant, making together the sum of £157 9*s*. 9*d*. The money, or any part thereof, whilst unpaid was to bear interest at the rate of five per cent. per annum. In addition to the mortgage security there was a personal covenant by George Curry to pay the sum just mentioned. From the date of the execution of the mortgage until the present moment there has been no payment of principal or interest, and there has been no acknowledgment either by George Curry or by the plaintiff or by any other person on behalf of either of them which would keep the mortgage security or the debt alive.

On 18th November, 1922, just one week before twelve years had elapsed from the date of the execution of the mortgage, the defendant caused an originating

summons to be issued out of the Chancery Division of the High Court of Justice in Northern Ireland against George Curry claiming to have the amount of his mortgage debt raised in the usual way, and on 18th December, 1922, Wilson, J., made an Order declaring that the sum secured by the said mortgage with interest thereon was well charged on George Curry's interest in the lands the subject of the mortgage and granting to the said John J. Rea, the plaintiff in the summons, the relief usual in such cases.

In an affidavit made by the said John J. Rea on 24th November, 1922, on which his application for relief was grounded, he swore that George Curry had by the said indenture of mortgage conveyed to him the lands in question, and the original indenture of mortgage was made an exhibit to the said affidavit.

An appeal was taken from the Order of Wilson, J., to the Court of Appeal, and that Court consisting of Moore, L.J., and Andrews, L.J., by an Order dated 15th February, 1923, reversed the Order of Wilson, J., on the ground that as George Curry in an affidavit sworn by him and used before Judge Wilson had maintained that he never executed a mortgage in favour of John J. Rea and that if he had executed a document purporting to be a mortgage he was not aware that it was of that nature, and as the fact of the execution of the mortgage was disputed that matter could not be decided on an originating summons. In reversing the Order of Wilson, J., the Court of Appeal gave leave to John J. Rea to institute a plenary suit in respect of the mortgage, and, upon that being done, put the defendant George Curry under terms not to plead the Statute of Limitations which, but for the issue of the originating summons, had run in his favour on 25th November, 1922.

No plenary suit has, up to the present, been instituted by John J. Rea, and the mortgage security and the debt have long since been barred. A considerable amount of time was taken up in the first argument, that is the argument before Andrews, L.J., and myself, as to whether the mortgage of 25th November, 1910, had been put in evidence at the trial of the action by

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Brown, J. The learned judge appears to have refused to admit it in evidence and judging from his notes this may have arisen by reason of the fact that the mortgage does not seem to have been during the trial regarded by the plaintiff in the same important light in which it has since appeared in this Court. However this may be, I am clearly of opinion that the mortgage ought to have been admitted in evidence and that to judge rightly in this case it must be so admitted. I merely mention the following facts in support of the view to which I have given expression. The document was pleaded in the defence ; the Attorney-General, for the plaintiff, entered documents numbered 1 to 35 in the First Schedule to John J. Rea's affidavit of documents, and the mortgage in question is No. 29 ; John J. Rea's affidavit of 24th November, 1922, used before Wilson, J., had already verified the execution of the mortgage and exhibited it, and this affidavit was unquestionably put in evidence before Brown, J. ; the defendant, John J. Rea, both in his direct examination before the learned judge and also in cross-examination, deposed to the execution of the mortgage ; and No. 29, the mortgage, was the only document of the entire 35 that was rejected. It was vital for the proper trial of the action that it should have been admitted in evidence and I cannot see how in face of the facts that I have just stated it can be excluded. For the purpose of deciding this case I assume in favour of the defendant that at and prior to its execution on 25th November, 1910, he had a valid solicitor's lien for the costs, charges and expenses incurred by him on behalf of George Curry.

What became of the lien on the execution of the mortgage ? It was either waived or abandoned by John J. Rea or became merged in the security of the mortgage, and whatever expression one uses, and whichever may be considered the more appropriate it is clear that the lien disappeared with the execution of the mortgage. If authority be needed for this proposition it will be found in the case of *In re Taylor, Stileman v. Underwood* (1), and in many other decisions

(1) [1891] 1 Ch. 590.

of a like nature. In that case it is laid down that a solicitor's lien extends only to his taxable costs, charges and expenses, which category includes all disbursements which can be moderated by the Taxing Master and are not necessarily allowed in full on being vouched, but does not include ordinary advances. Whether the taking of security by a person having a lien is an abandonment of the lien depends on the intention, whether expressed or to be gathered from the circumstances of the case ; that *primâ facie* where a solicitor whose duty it is to advise his client as to his rights and liabilities takes from his client a security for costs without explaining that he intends to reserve his lien, the lien is abandoned. No intention to reserve his lien was explained by the defendant to George Curry in this case and the lien disappeared on 25th November, 1910, and I can find nothing to justify the contention that notwithstanding the fact that the mortgage security and debt have been barred there is still available to the defendant a lien upon which he can rely as an answer to the present action.

The defendant has failed, or, to speak more accurately, has not attempted to show how the lien was kept alive or how if dead on the mortgage being executed anything has occurred to revive it.

If it had been necessary to do so for the purpose of deciding that the defendant's claim is untenable, I should have been prepared to hold, as at present advised, following the decision of Ross, J., in *Beamish v. Whitney* (1), and having regard to the observations of Sir George Jessel, M.R., in *Sutton v. Sutton* (2), that the debt owed by the plaintiff or his father to the defendant has been not only barred but has been wiped out, and that as no debt remains no lien can exist in respect of it, but as I can arrive at the conclusion which, in my opinion, the justice of the case requires without deciding the point, my observations on this matter can only be regarded as *obiter*.

The defendant's right of action is not merely barred by the efflux of time but his title to the lands has been altogether extinguished and the plaintiff has thus

(1) [1909] 1 I.R. 360, 365. (2) 22 Ch.D. 511, 515, 517.

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become the legal owner of the lands. Having become entitled to the legal estate in the lands he has a right to the possession of the title deeds relating thereto, for as Lord Tenterden said in *Harrington v. Price* (1), "it is "an established principle, that whoever is entitled to "the land has also a right to all the title deeds affecting "it," and applying that principle to the present case it follows that the plaintiff, who is the person entitled to the lands, is entitled to the custody and to the ownership of the title deeds relating to the same.

MEGAW, J.

MEGAW, J.: I agree and have only a few words to add.

After the hearing of the appeal I had come to a clear conclusion that it must succeed on the short grounds that assuming the defendant's case as to the debt was well founded—which indeed has been found by the trial judge—that debt, originally a simple contract debt secured by a lien, had become a specialty debt secured by the deed of 25th November, 1910, and charged on the lands by that deed, and that when the mortgage security had ceased to exist the mortgagor or his successor in title became entitled as owner of the lands to the possession of the documents of title thereto. I may say that I have no doubt that this mortgage deed was entered in evidence at the trial. It is set out in the statement of defence, is mentioned as entered in the learned judge's notes, is referred to in the plaintiff's own direct evidence, and was the subject of cross-examination. I cannot see how it could be excluded from consideration of the issues involved. On the execution of that mortgage it seems to me that any lien on the deeds that the defendant may have had, came to an end and that he thenceforth held all documents of title as mortgagee.

Admittedly no payment has ever been made on foot of the mortgage, and I fail to understand how, when such issues as were raised on the proceedings by originating summons in 1922, the defendant permitted a matter which affected his pocket as well as his professional honour to remain quiescent.

It is clear consequently that by the lapse of time the mortgagor and his predecessors in title, having re-

(1) 3 B. & Ad. 170, 173.

mained in undisturbed possession of the lands the subject of the mortgage, have acquired a statutory title to the lands freed from the charge created by the mortgage. The title deeds of the land, as is so clearly stated in the case of *Harrington v. Price* (1), referred to by Best, L.J., fall into the ownership of the person entitled to the lands.

As regards the contention that the Statutes of Limitation do not put an end to the debt, though they extinguish the charge, I am disposed to agree with Andrews, L.J., that the bulk of authority supports that opinion. There are not at the present day many cases in which this distinction is of practical importance, and in my opinion it is a pity that such a subject for nicety of legal discrimination should exist, but I do not think that this matter affects the decision in the present case. The lien—if lien there was—came to an end when the mortgage was executed, and, as has been pointed out, nothing appears which could have the legal effect of reviving it.

Consequently the plaintiff is entitled, in my opinion, to succeed in his action.

I wish to add one word as regards the defence of the Statute of Limitations. There are cases where the defence is unmeritorious, but in many cases where by the effluxion of time, death of witnesses, destruction of documents, and changes of circumstance, proof of payment, or discharge, or waiver of an old obligation may be difficult or impossible, the Statutes of Limitation operate in the interests of justice, and it is better that if an obligation is to be enforced it should be done without undue delay. Indeed it seems to me that the present case illustrates the importance of this factor in jurisprudence. If it were not for the operation of the Statutes ill-kept complicated and contested accounts for thirty-five years would have to be considered.

Solicitors for the appellant: *Simmons, Meglaughlin & Orr.*

Solicitors for the respondent: *W. G. Wilson & Son.*

(1) 3 B. & Ad. 170, 173.

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MURPHY v. NORTHERN IRELAND ROAD TRANSPORT BOARD (1).

Motor Omnibuses—Used by Hotel Proprietor partly for Conveyance of Hotel Guests and partly for Tours—Whether "Road Motor Undertaking"—Road and Railway Transport Act (Northern Ireland), 1935 (25 & 26 *Geo.* 5, *c.* 15), *sections* 5 (1), 5 (3) (*a*), 15 (1), 15 (4) (*f*).

Section 5 (1) of the Road and Railway Transport Act (Northern Ireland), 1935, made it the duty of the Northern Ireland Road Transport Board, within a period of six months from the day on which the said Act came into force, to acquire every road motor undertaking operated for hire or reward in Northern Ireland. Section 15 (1) provided that a person, other than the Board, should not use a motor vehicle on any public highway for the conveyance of passengers for hire or reward except with the consent in writing of the Board and the approval of the Ministry of Home Affairs. Section 15 (4) (*f*) provided that this section should not apply to the use of a motor vehicle by the proprietor of an hotel for the conveyance of hotel guests and their luggage to or from the hotel from or to a railway station, quay or aerodrome.

The plaintiff, who was the proprietor of two hotels, owned two motor omnibuses which were reserved entirely for hotel guests, and which he had used partly for the purpose of conveying hotel guests to and from his hotels, from and to Larne and Belfast, and partly in taking guests who came to his hotels upon inclusive week's tourist tickets, on advertised motor tours.

Held, (Best. L.J., dissenting), affirming the decision of Megaw, J., in the Chancery Division, that such operation by the plaintiff of the said omnibuses did not constitute a road motor undertaking within the meaning of the Act.

ACTION by the plaintiff, a hotel proprietor, for a declaration that the defendants who are constituted as a public authority under the provisions of the Road and Railway Transport Act (Northern Ireland), 1935, for the purpose of acquiring and working various transport undertakings in Northern Ireland, were not entitled to acquire certain motor omnibuses owned by the plaintiff.

(1) In the Court of Appeal before Moore, L.C.J., and Andrews and Best, L.JJ.

The facts are fully set out in the judgment of Megaw, J.

Murphy, K.C., Hume, K.C., and *McSparran* for the plaintiff.

Black, K.C. and *MacDermott* for the defendants.

Cur. adv. vult.

MEGAW, J.

MEGAW, J.: This action was brought by Patrick Murphy, a hotel proprietor carrying on business in two hotels in the town of Antrim.

He seeks a declaration that the defendants, who are constituted as a public authority under the provisions of the Road and Railway Transport Act (Northern Ireland), 1935, for the purpose, among other things, of acquiring and working various transport undertakings in Northern Ireland, are not entitled to acquire certain motor omnibuses owned by the plaintiff.

The question to be determined is whether the omnibuses owned by the plaintiff constitute a "road "motor undertaking" within the meaning of the Act. There is no definition of the term "road motor under-"taking" in the Act itself, and a number of sections of the Act are relevant in considering the scope of the defendants' powers.

The facts regarding the acquisition and user of the plaintiff's omnibuses are really not contested. Briefly they are as follows: The plaintiff for some years has carried on in the summer months an extensive business of catering for tourists. He owns two hotels in the town of Antrim, and in connection with these hotels he advertises an attractive tourist programme at popular rates. These tours are advertised at an inclusive charge, based on starting from Belfast or Larne and ending in Belfast or Larne, the standard cost per week being £4 17*s.* 6*d.*, which includes the accommodation in plaintiff's hotels, conveyance of the guest and his luggage from and to Belfast or Larne, and motoring tours in Ulster of 500 miles with free admission to places of interest. Prior to 1932 Mr. Murphy hired the car accommodation necessary for these tours, but

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afterwards he acquired two omnibuses—a 30-seater in April, 1932, and a 19-seater in May of the following year. These are the omnibuses which the Board claims to form a motor transport undertaking. They are used partly for the conveyance of hotel guests to and from Belfast and Larne, and partly for the tours in Northern Ireland advertised as part of the attraction to hotel guests.

Evidence at the trial has established that for the purpose of conveying the guests to or from the hotels and the railway stations and quays the accommodation given by two omnibuses would necessarily and reasonably be required.

The omnibuses are not available for members of the public generally nor indeed for any guests of the hotels of the plaintiff other than those coming under the inclusive tourist programme to which I have referred. Some instances were given at the hearing where they had been provided for other purposes, but these instances were such as showed that the plaintiff even before the Transport Act had sedulously avoided hiring his omnibuses for payment.

I have no hesitation in finding as a fact that the use to which the plaintiff has always put and does now put the omnibuses in question is partly in conveying his hotel guests to and from the railway stations and quays and partly in taking his tourist guests on the advertised tours, and that the user of the omnibuses is not anything in the nature of a general motor transport business, but is entirely incidental to the attractive hotel business he carries on.

The defendants have formed the opinion that the operation of these two omnibuses constitutes a motor road undertaking within the meaning of their Act, and having considered it their duty under the Act, served a statutory notice of transfer on the plaintiff on 30th November, 1935, and in due course on 30th December, 1935, made a vesting order purporting to vest the two omnibuses in them.

In his pleadings the plaintiff has adopted the word " undertaking "—no doubt taking it from the language of the vesting order, but it seems to me rather strange

that making the contention he does, he should refer to the user of the omnibuses as a definite and separate undertaking. I should like to call attention here to the phraseology used by the plaintiff's pleaders—the endeavour by the use of a downward stroke between two conjunctions "and" and "or" to import some double meaning into the pleadings. Whatever effect this may have in certain commercial documents I regard it as objectionable in legal pleadings and am inclined to think that it is in contravention of the rules of Court, and tends only to embarrassment. Pleaders should say what they have to say definitely and without ambiguity.

In coming to a conclusion as to whether the operation of the two motor omnibuses constitutes a road motor undertaking within the meaning of the Act, it must be borne in mind that in construing an Act such as the present, where a legal business is to be acquired compulsorily, it must be clearly and definitely shown that such business is included in the language of the Statute, and every part of the Statute that is relevant must be considered. Section 4 (1) (*a*) of the Act throws some light on the meaning of the legislation by its reference to providing a system of transport which gives "efficient, economical and convenient transport services *to the public*." This language would suggest that it is transport for the public and not for a restricted number who have their temporary habitation in one house which is to come under the management and control of the Transport Board.

Clearly the omnibuses are used as subsidiary to the hotel business, and not the hotels as subsidiary to a transport business.

The important sections of the Transport Act in coming to a decision in this case are sections 5 and 15.

Section 5 enacts that the Board shall, within a period of six months from the day on which the Act comes into operation, acquire "every road motor under-"taking operated for hire or reward in Northern "Ireland."

While the use of plaintiff's omnibuses in the way established by evidence has incidental to it profit or

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gain as forming part of the hotel business, I hardly think that its use as ancillary to and forming part of that business of itself would constitute it a "road "motor undertaking." I will assume, however, in defendants' favour that if the words I have quoted stood alone such might be the case.

Reading a later part of the section among other things we find excluded from the Board's power to acquire under sub-clause (*c*) "any road motor under- "taking, so far as the same was carried on immediately "before the passing of this Act for a purpose excepted "from the provisions of section 15 of this Act by "sub-section (4) of that section."

Now it seems to me and I find as a fact that these two motor omnibuses were used by the plaintiff for the purposes mentioned in this sub-section, and that they were *bonâ fide* so used at and before the time of the passing of the Road and Railway Transport Act.

One must now refer to the provisions of section 15 sub-section (4) to ascertain the exceptions to the wide powers of the Board and among other things we find that the section is not to apply under heading (*f*) "to "the use of a motor vehicle by the proprietor of an "hotel for the conveyance of hotel guests and their "luggage to or from the hotel from or to a railway or "omnibus station, quay or aerodrome."

Consequently the acquisition of such motor vehicles is excluded from the operation of section 5.

When I have come to that conclusion it seems to me that the case is determined. The provisions of the Act are not to be strained in favour of the defendants.

There is no provision by which this exclusion from the powers of the Board can be effected by some method of partition.

Mr. Black contended that the provisions of section 5 sub-section 3 (*a*), which sets out the operation of a vesting order, enabled the Board to effect its purpose, as a vesting order in certain circumstances might transfer to and vest in the Board part of an under- taking consisting of road services for the conveyance of passengers and the words "wholly or mainly applied "to or used in connection with the provisions of road

" motor transport services " brought the motor omnibuses of the plaintiff within the scope of the Board's powers. The answer to this argument is that the vesting order is only applicable to such subject matter as the Board have a power and duty to acquire. It does not enlarge their power of acquisition. The vesting order is only the means of transferring such property as the Board has power to acquire.

Consequently I am of opinion that the plaintiff is entitled in substance to the declaration he seeks. I think that the pleadings should be amended. The declaration given by the Court should only refer to the " motor omnibuses."

The defendants appealed to the Court of Appeal.

Black, K.C., MacDermott, K.C. and *Curran* for the appellants :—

The question to be determined is whether the motor omnibuses owned by the plaintiff constitute a road motor undertaking within the meaning of section 5 (1) of the Road and Railway Transport Act (Northern Ireland), 1935. Under this section the defendants are under a statutory obligation to acquire " every " road motor undertaking operated for hire or reward " in Northern Ireland."

Section 5 (2) enables the Board to make a vesting order in the case of every undertaking acquired under section 5 (1) and section 5 (3) (*a*) provided that such vesting order should operate " so as to transfer to and " vest in the Board such part of the undertaking as " consists of the provision of road motor transport " services for the conveyance . . . of passengers " . . . which was . . . wholly or mainly applied to " or used in connection with the provision of the said " services." The words " wholly or mainly applied " to or used in connection with the said services " brings the omnibuses owned by the plaintiff within the scope of the Act.

The Board could withhold their consent under section 15 (1) to the use by the plaintiff of the omnibuses if he retains them, and in such circumstances his loss

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might be greater than if the omnibuses were transferred to the Board and compensation paid.

The Act by section 15 (4) (*f*) read along with section 5 (1) (*c*) expressly excludes a road motor undertaking so far as the use of a motor vehicle by the proprietor of an hotel is confined to the conveyance of hotel guests and their luggage to or from the hotel to a railway or omnibus station, quay or aerodrome. The axiom *expressio unius est exclusio alterius* is applicable and it should be inferred that the Act includes and applies to a road motor undertaking carried on by an hotel proprietor for any other than such specified purposes.

Murphy, K.C., Hume, K.C. and *McSparran* for the respondents :—

The vesting order referred to in section 5 (3) (*a*) of the Act is only applicable to such subject matter as the Board have the power and duty to acquire. It is the only means of effecting the transfer of such property as the Board have power to acquire. It does not enlarge their power of acquisition.

The purpose of the Act as set out in section 4 (1) (*a*) is to provide a system of transport which gives "efficient, economical and convenient transport ser- "vices to the public." The Act was never intended to apply to a strictly limited number such as the conveyance by the plaintiff of his hotel guests on tours. The operation of the omnibuses is subsidiary to the hotel business.

"Acts which establish monopolies, or confer ex- "ceptional exemptions and privileges, correlatively "trenching on general rights, are subject to the "principle of strict construction." [Maxwell, *On the Interpretation of Statutes*, Sixth Edition, page 515.) The onus of proving the compulsory purchase and transfer contended for is upon the defendants.

The contention that the Board could withhold its consent under section 15 (1) if the omnibuses are retained by the plaintiff is an *in terrorem* argument. The argument relied upon by the defendants under section 15 (4) (*f*) does not apply as the plaintiffs'

business is not a road motor undertaking within the meaning of the Act.

If the Board take over plaintiff's undertaking they are debarred by section 4 (2) (*b*) from afterwards hiring buses to him. For by that sub-section "the "Board may in exercise of their duties as aforesaid "hire vehicles from or let vehicles on hire to any other "transport undertaking."

Black, K.C., (replied).

Cur. adv. vult.

SIR WILLIAM MOORE, L.C.J.

MOORE, L.C.J.: This is a question of mixed law and fact, and, as stated by Mr. Black in the opening of the appeal, that question is whether the plaintiff's business involving tours is a "road motor undertaking" within the meaning of section 5 (1) of the Road and Railway Transport Act (Northern Ireland), 1935.

The learned judge has found the facts, which are not in dispute, so that it is hardly necessary for me to recapitulate them, to any appreciable extent.

The plaintiff is an hotel proprietor in the little town of Antrim; he conducts during the summer months two hotels there with bedroom accommodation for 200 persons. I will call them "guests." These guests come from Great Britain on an inclusive term of £4 17*s.* 6*d.* per head, to stay for a week. The plaintiff keeps two buses for their entertainment, bringing them to different parts of the country on different days of their stay. These buses are exclusively used during the summer months for the amusement of such guests. No fares outside the exclusive ticket are charged or collected, and they do not in the ordinary sense ply for hire with the public.

I agree with the learned judge that the plaintiff's "undertaking," using the word purely in a general sense, is that of hotel business, and that, as he has found, the use of the buses is entirely ancillary to it.

I can not call this a road motor transport undertaking within the meaning of the Act. Such an "undertaking" alone comes within the general provisions of section 5 (1) and subsequent sub-sections.

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This I think is made clear by sub-section (3) relating to the vesting. All property of the owners of a road motor transport service, etc., is transferred to and vested in the Board subject to two exceptions or qualifications.

Firstly, book debts are to be excluded from the undertaking (otherwise they would vest). On this see further proviso for their acquisition by agreement in same sub-section.

Secondly, the acquisition of all property shall only apply to "property . . . wholly or mainly applied to "or used in connection with the provision of the said "service." Where one has "a road motor under-"taking" this would apply to garages, etc. But where not "wholly or mainly, etc.," such other property is by implication also excluded.

Now the judge has in effect found that the undertaking is an hotel undertaking with a road service (seasonal) only in connection with it as subsidiary.

Apart from the possible absurdity, if so, the hotels cannot be said to be "mainly or wholly used in con-"nection" with the provision of these two buses, or for road transport.

Except so far as the Act has allowed it by the two qualifications I have mentioned, there is no power to partition the property of any undertaking such as the present hotel undertaking, and if the whole undertaking is one and indivisible otherwise, as the judge expressly says, and the Board can not take over the predominating hotel portion as part of "a road motor undertaking," then in my judgment the Court below was right in so deciding, and the appeal should be dismissed with costs.

I agree that some difficulty may arise in consequence of the provisions of section 15 (1), but the plaintiff through his counsel states he is willing to stand the risk of total prohibition, and, if any respect is to be shown for the judgment of the Court of Appeal and they should decide this case against the appellants, I think it is probable that the Board will hardly refuse the consent necessary under that section.

[Unrevised].

ANDREWS, L.J.: The question which we are called upon to determine in the present case is whether the plaintiff is the owner of a road motor undertaking which should in whole or in part be acquired by and transferred to the defendants under the provisions of the Road and Railway Transport Act (Northern Ireland), 1935.

The material facts are not in dispute. The plaintiff is the proprietor of two hotels in the town of Antrim. In connection with these he has organised tours for several years past, known as "the Massereene Tours." Seven days of hotel accommodation and 500 miles of motoring are provided at an inclusive cost of £4 17*s.* 6*d.*, and visitors are conveyed to and from boats and trains in Belfast and Larne at the commencement and end of tours free of charge. Should visitors require to be taken to either boats or trains at any other time a "small nominal charge" is made.

In connection with these tours the plaintiff provides two buses. They are reserved entirely for hotel guests who have taken the £4 17s. 6d. week's holiday ticket. The general public are not accommodated; even ordinary hotel guests are not permitted to go upon the tours. An attempt made at the trial to establish that the buses were sometimes used or hired out for other general excursion purposes failed and was expressly abandoned in the arguments in this Court. The manner in which the buses are used differs in certain other material respects from buses engaged in ordinary road transport services. Thus, there are no time tables, no stages, no separate fares, and no conductors. No attempt was ever made by the Fares and Rates Tribunal to fix fares under section 7 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1929, doubtless because there were no separate fares and no standing or plying for hire within section 11 of The Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926. Indeed, to put it briefly, the user of these buses has no feature in common with the user of buses engaged upon ordinary road transport services.

Upon these facts Megaw, J., arrived at certain findings of fact. The first of these was that the use to

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which the plaintiff has always put and does now put the omnibuses is partly in conveying his hotel guests to and from the railway stations and quays, and partly in taking his tourist guests on the advertised tours. The second was that the user of the omnibuses is not anything in the nature of a general motor transport business, but is entirely incidental to the hotel business which he carries on. In other portions of his judgment he speaks of the use of the omnibuses being ancillary to and forming part of the hotel business ; and he says that clearly the omnibuses are used as subsidiary to the hotel business, and not the hotels as subsidiary to a transport business. All these findings of fact are, in my opinion, not only amply supported by evidence, but they are conclusions which in every case I would myself have arrived at. The legal rights of the parties under the Act of 1935 must be ascertained and determined upon the basis of such findings.

The preamble of that Act includes as one of its purposes provision for the transfer to the Northern Ireland Road Transport Board of various road transport undertakings and interests. Such transfer is effected by Part II of the Act, section 5 of which provides that the Board shall . . . acquire every road motor undertaking operated for hire or reward in Northern Ireland with certain specified exceptions. These exceptions are (*a*) the tramway and omnibus undertaking of the Belfast Corporation ; (*b*) the road transport services of the Londonderry and Lough Swilly Railway Company ; and (*c*) any road motor undertaking so far as the same was carried on immediately before the passing of the Act for a purpose excepted from the provisions of section 15 of the Act by sub-section (4) of that section. It is with the latter exception alone that we are concerned in the present case.

However, before considering the terms of this exception the preliminary question which must be determined is whether the plaintiff's road motor service can properly be regarded as a "road motor "undertaking" within the Act. The Act contains no definition of the word "undertaking," which personally I interpret as meaning "business." In

my opinion the plaintiff is not the proprietor of such a "road motor undertaking." He is the owner of an hotel business or undertaking, in connection with and as ancillary to which he conducts these motor tours. The buses are provided for the hotel guests, rather than the hotels for the bus passengers. In no sense is the bus service which the plaintiff provides a separate transferable undertaking.

Certain essential features of a road motor undertaking appear in section 5. It must be "operated for "hire or reward," and it must provide a "road "transport service." When I read these two conditions together I have no doubt that what the legislature refers to as a road motor undertaking is a business in which motor vehicles ply in the ordinary way for hire or reward at fixed fares and rates, transporting passengers or merchandise from one place to another in a service available to all members of the public. It was such road motor undertakings which at the time of the passing of the Act were carrying on in many cases a competitive business on uneconomic lines to the serious prejudice of the railway companies; and it was the aim and intent of the legislature that such ruinous competition should be put an end to by bringing all such road motor undertakings under one unified control. It was in this way that it was conceived that the system of transport could be properly co-ordinated, and efficient, economical, and convenient transport services provided for the public, as provided in section 4 (1) of the Act. The fulfilment of such purposes did not, however, demand that omnibuses which were not provided for the use of the general public, but merely for the use of certain hotel guests, should be taken over by the Board; and unless coerced to do so by the language of the Act, which I am glad to say I am not, I should not impute to Parliament an intention to do an act so obviously unjust to the plaintiff and possibly to other hotel proprietors, and at the same time so obviously inimical to the development of tourist traffic in the province.

Other considerations arising upon the Act impel the same conclusion. In section 5 (3) it is provided

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that the vesting order vesting a road motor undertaking in the Board should operate so as to transfer to and vest in the Board such part of the undertaking as consists of the provisions of road motor transport services . . . for hire or reward . . . including all property of the owners of the undertaking transferred (other than book debts or cash) which was immediately before the day of transfer wholly or mainly applied to or used in connection with the provisions of the said services. Thus all such property of the undertaking, other than book debts or cash, passes under the vesting order. This would include not merely the omnibuses but the garage, which probably forms part of the hotel premises, with all its plant, equipment, and supplies. This, it appears to me, would be an absurd result ; and it would be none the less absurd because, if the Board did not require it, they would have power to sell or lease it to anyone they pleased under section 13 (2) (*a*) of the Act.

In other respects also, as it seems to me, the Act could not be applied to a case such as the present without effecting grave and manifest injustice. Thus, if the transfer sought by the Board in the present case were effected, the hotel business, so dependent upon it, would necessarily be prejudicially effected, if not destroyed ; and I can find no provision in the Act which would permit the Arbitration Tribunal to award any compensation in respect of such loss. The Act appears to me to provide compensation only for a road motor undertaking or for the part of such undertakings which is transferred ; it does not provide compensation for an hotel business which, though irreparably damaged, is retained.

It was, however, contended before us that the plaintiff could continue his tourist business in much the same way as hitherto by hiring buses from the Board. In my opinion this is not so. The Board's power of letting out vehicles on hire is confined by section 4 (2) (*b*) to lettings to "any other transport undertaking," which *ex hypothesi* the plaintiff's business would, after the transfer, have ceased to be or to include ; and it is, I think, clear that the rights and

powers in regard to such road services would, in the event of a transfer to the Board, fall to be exercised by them and not by the plaintiff (section 5 (3) (*b*)). They could not, however, be compelled to provide buses for the purpose ; and, if they did provide them, the profits would be theirs, not the plaintiff's.

There remain to be considered the arguments addressed to us upon section 15 (1) and section 15 (4) (*f*) of the Act. In regard to the first of these sections it is contended that as the Board could withhold their consent to the use by the plaintiff of the omnibuses if they are retained by him, his loss might in such event be greater than if they are transferred and compensation provided. This is what Mr. Murphy characterised as the *in terrorem* argument. Now, even if one assumes that the conveyance of plaintiff's hotel tourist guests in these buses is a conveyance for hire or reward within the section, I confess that I cannot bring myself seriously to consider an argument which is based on the deliberate intention of a public body appointed by the Minister of Home Affairs to circumvent and defeat the judgment of this Court. Such a contingency I refuse to contemplate ; and, in my opinion, it would have been better if such a suggestion had not been made.

I turn now to section 15 (4) (*f*), which is to be read in connection with section 5 (1) (*c*). The argument based upon this section has, I admit, given me more difficulty than any other part of the case. It is simply this that, as the Act expressly excludes a road motor undertaking so far as the use of a motor vehicle by the proprietor of an hotel is confined to conveyance of hotel guests and their luggage to or from the hotel from or to a railway or omnibus station, quay or aerodrome, it should be inferred that the Act includes and applies to a road motor undertaking carried on by an hotel proprietor for any other than such specified purposes. Now the axiom of law "*Expressio unius est exclusio alterius*," upon which this argument is founded, must always be applied with caution. As Lord Campbell, C., pointed out in *Saunders v. Evans* (1),

(1) 8 H.L.C. 729.

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it is not of universal application. It depends upon the intention of the parties as it can be discovered on the face of the instrument, or upon the transaction. In the present case I cannot apply the maxim without producing the remarkable result that, as an omnibus is an indivisible entity, the bringing of the omnibuses within the operation of the Act for the one purpose, namely, the tours, would necessarily deprive the plaintiff of the protection expressly provided for him by sub-section (*f*) for the other purpose, namely, the conveyance of hotel guests from and to a railway, omnibus station, quay, or aerodrome. In truth, the fallacy which underlies any attempted universal application of the maxim to which I have referred is the assumption that the legislature had all possible purposes and uses present to its mind, so that the omission of one such purpose may be taken to be its deliberate act. In the present case I doubt if Parliament ever contemplated the case of hotel buses being used on such inclusive tours. However, no difficulty of this character arises, if one holds, as I do, that the plaintiff's business is not a road motor undertaking within the Act, and, accordingly, that the Act does not apply.

Finally, I would add that in determing the issue which we are called upon to decide in this case, we are not only entitled, but it is our duty, to apply the well-recognised principle of construction referred to in *Maxwell on Statutes*, 6th Edit., 515, and *Reed v. Ingham* (1), that Acts of Parliament which create monopolies, interfere with the general right of the subject, or confer exceptional exemptions and privileges, correlatively trenching on general rights, are subject to the principle of strict construction. It is for the defendants to establish to our satisfaction that the legislature effected the compulsory purchase and transfer contended for. This, in my opinion, they have failed to do, and the appeal should be dismissed with costs. The order of Megaw, J., should, however, in my opinion, be varied in form by including the word of the Statute "undertaking" in conjunction with the words "motor omnibuses" therein appearing.

(1) 3 E. & B. 899.

BEST, L.J.: The question for decision in this case is whether the tours advertised and run by plaintiff constitute a road motor undertaking within the meaning of section 5, sub-section (1) of the Act.

If they constitute such an undertaking, the Board are under a statutory obligation to acquire it unless it can be shown that the undertaking comes within one of the exemptions provided for in section 15 of the Act.

Now undertaking is nowhere defined in the Act, but on consulting the dictionary, I find it described as any business, work, or project which a person engages in or attempts to perform; it means an enterprise, and it also means a promise or engagement.

It cannot be denied that the plaintiff has in fact hitherto carried on the business or work or project of conducting people on tour to many of the famous spots of Northern Ireland, and in order to carry on that business he has had to provide them with transport services.

It is said that plaintiff's real business is that of hotel proprietor and that the project or enterprise of carrying his guests on tour is subsidiary or ancillary to the hotel business proper and is only indulged in by the plaintiff for the purpose of inducing people to stay at the hotels and as a means of increasing his business. It might equally well be said that the conveyance of guests from their places of arrival in Northern Ireland to the hotel or from the hotel to their point of departure is subsidiary or ancillary to the hotel business proper, and yet a special sub-section (4) (*f*) of section 15 had to be inserted in the Act to preserve this right to the hotel proprietor.

It may be, and most probably is, true that by the ingenious method of combining tours with hotel accommodation many more people have been induced to come to these parts than would have come if the projects of being entertained at plaintiff's hotels and of being brought on tour had been advertised and worked separately. Nevertheless the fact remains that the guests having been installed in plaintiff's hotels are brought on tour in pursuance of his promise

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or engagement and as a part of his undertaking, and they are conveyed in his buses to the various places advertised.

If the plaintiff had found it not convenient or profitable to run the buses himself, and had, in consequence of this or for any reason whatever, made an arrangement with another person in Antrim or elsewhere to carry the hotel guests on the identical tours on which they are carried by plaintiff, could it be said that that other person was not operating a road motor undertaking for hire or reward in Northern Ireland? That person would in my opinion come directly within the provisions of section 5, sub-section (1), of the Act, and I am unable to see how his case can be differentiated from that of the plaintiff.

In order to find what the Transport Board are empowered and bound to take over, one must look at the general frame of the Act. This was the point put in the forefront of Mr. MacDermott's argument, and it appears to be clear that the intention of the Act or its scope is that the exclusive management and the control, with certain specified exceptions, of all road motor transport services for the conveyance of passengers or their luggage and for the carriage of merchandise in Northern Ireland are to be acquired and operated by the Board, and that the Board should be the owner of everything necessary for the due performance of those services.

Thus section 4, sub-section (1), provides that it shall be the duty of the Board so to exercise their powers under the Act as to secure, in conjunction with the railway companies, the provision of a system of transport by road, railway and other means of transport in Northern Ireland which (*a*) is properly co-ordinated and (*b*) gives efficient, economical and convenient transport services to the public.

The vesting order made under section 5, sub-section (3) (*a*) of the Act is to operate so as to transfer to and vest in the Board such part of any undertaking as consists of the provision of road motor transport services for the conveyance or carriage of passengers or merchandise for hire or reward within Northern

Ireland, including all property of the owners of the undertaking transferred (other than book debts or cash) which was immediately before the day of transfer wholly or mainly applied to or used in connection with the provisions of the said services.

It should be noted here that there is no mention of the public and that the Board is to have vested in them such part of any undertaking as consists of the provision of road motor transport services for the conveyance of passengers for hire.

Do not the passengers conveyed on plaintiff's tours come directly within the provisions here mentioned ? And whether they do or not, are not the omnibuses employed in so conveying them, though not at the time plying for hire, public service vehicles within the meaning of section 43 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 ?

Again, under section 10, sub-section (1), the Board, subject to the provisions of the Act, shall have power to provide and own omnibuses, coaches and other vehicles moved, propelled or drawn by mechanical, electrical or animal power (in the Act referred to as "road vehicles"), and to use and run road vehicles upon public highways for the conveyance of passengers and their luggage and the carriage of merchandise.

By section 15, sub-section (1), a person other than the Board shall not use a motor vehicle on any public highway for the conveyance of passengers or their luggage or the carriage of merchandise for hire or reward, except with the consent in writing of the Board and the approval of the Ministry of Home Affairs. It is said that some difficulty may arise in consequence of this provision if the appeal should be disallowed, but it appears to me to be an absolute prohibition of the use of any motor vehicle on any public highway in Northern Ireland for the conveyance of passengers or their luggage or the carriage of merchandise for hire or reward unless such use is consented to by the Board and has the approval of the Ministry of Home Affairs.

From a consideration of these and other sections it seems clear that, whether one likes it or not, the policy

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of the Act was to grant to the Transport Board the exclusive right, the monopoly, of providing road motor transport services for the conveyance of passengers or their luggage, and for the carriage of merchandise, for hire or reward in Northern Ireland, and that such exclusive right, such monopoly, is limited only to the extent of the provisions contained in sub-sections (4) and (5) of section 15 of the Act.

Now the only one of these provisions which can be called in aid by the plaintiff is that contained in sub-section (4) (*f*). This section, 15 (1), which prohibits the use by any person other than the Board of a motor vehicle on any public highway for the conveyance of passengers or their luggage or the carriage of merchandise for hire or reward, except with the consent and approval mentioned in the section, shall by sub-section (4) (*f*) not apply to the use of a motor vehicle by the proprietor of an hotel for the conveyance of hotel guests and their luggage to or from the hotel from or to a railway or omnibus station, quay or aerodrome.

This is the sole concession made to hotel proprietors and, in my opinion, it is decisive against plaintiff's claim. The hotel proprietor is protected in so far as he conveys hotel guests and their luggage between his hotel and the railway or omnibus station, quay or aerodrome at which those guests arrive or from which they intend to take their departure, and even this protection is only afforded so far as the undertaking was carried on immediately before the passing of the Act ; in no other way is the hotel proprietor protected, and the maxim *Expressio unius est exclusio alterius* is surely applicable to the case.

Perhaps I may be permitted to digress here for a moment and to say that this judgment was written very shortly after the hearing of the case had concluded on June the 8th last, and that, notwithstanding the observation of Lord Campbell, C., in *Saunders v. Evans* (1), and the argument based upon that observation in the judgment just delivered by my Brother Andrews, I still think that the maxim is properly applicable to the circumstances of this case. Section

(1) 8 H.L.C. 729.

15, sub-section (1), absolutely prohibits any person from using a motor vehicle on a public highway for the conveyance of passengers or their luggage or the carriage of merchandise for hire or reward except with the consent in writing of the Board and the approval of the Ministry of Home Affairs. Sub-sections (4) and (5) of the same section give a detailed list of those uses of vehicles which do not require such consent and approval. Sub-section (4) enumerates under no less than twelve different heads or sub-heads the cases in which the vehicles may be so used, and the sub-section appears to me to have been drafted with the greatest care and particularity, and yet we are told that there is a fallacy underlying the application of the maxim because such application is based on the assumption that the Legislature had all possible purposes and uses present to its mind, so that the omission of one such purpose may be taken to be its deliberate act. I think the true way of looking at the matter is that the Legislature set out to create what is in substance a monopoly for the Board in the use of motor vehicles on public highways for certain purposes, and that they deliberately exempted from the scope of that monopoly only such uses of those vehicles as are set out in sub-sections (4) and (5), and that every other use must be taken to be prohibited unless it has the consent and approval mentioned in sub-section (1). I see no reason, therefore, for altering the opinion which I had formed after considering the matter carefully that the concession made to hotel proprietors in sub-section (4) (*f*) of section 15 is decisive against plaintiff's claim.

In this connection a nice question may arise as to whether, if the Board are declared to have the right to acquire plaintiff's motor undertaking in so far as same relates to the tours, they are at liberty to acquire the omnibuses by reason of the fact that he is protected in the use of those omnibuses for the conveyance of his guests to the extent just mentioned, and by reason of the further point made by plaintiff that this conveyance of his guests is said to be free and therefore is not operated for hire or reward.

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It was said on behalf of the plaintiff by Mr. Hume that the service of motor vehicles supplied to his hotel guests is not open to the public at large, but neither would the provision of buses to convey Sunday School children to the seaside for an excursion be a service open to the public at large, and yet no one would be bold enough to deny that the Board could make such provision, and this illustration indicates the answer to another argument put forward by Mr. Hume. His argument was that if the Board take over plaintiff's undertaking, they are debarred from hiring buses to the plaintiff, and in support he referred to section 4 (2) (*b*) of the Act: "Subject to the provisions of this "Act, the Board may in the exercise of their duties "as aforesaid, hire vehicles from, or let vehicles on "hire to, any other transport undertaking." The duties aforesaid are to secure in conjunction with the railway companies the provision of a system of transport which shall be properly co-ordinated and give efficient, economical and convenient transport services to the public. Sub-section (2) (*b*) merely enables the Board to do what might otherwise have been considered outside their power, and it is clear from section 10, sub-section (1), that the Board in collaboration with the plaintiff may arrange for these tours as before, because by that sub-section it is provided that the Board shall have power to use and run road vehicles upon public highways for the conveyance of passengers. These words are wide enough, in my opinion, to enable the Board to make arrangements for carrying plaintiff's guests on their tours, just as the Board can equally make arrangements for the conveyance of any particular class of persons by any route on the public highway to any particular place desired.

We have been pressed with the argument that plaintiff is being compulsorily deprived of a part of his business which is most lucrative and that there is no provision in the Act for awarding him adequate compensation.

On referring, however, to the following sections or parts of sections, it will be seen that the plaintiff's interests are fully protected:—

(1) If any question arises as to the extent of any transfer effected by the operation of a vesting order, that question shall, subject to the provisions of this section, be referred to and determined by the arbitration tribunal: section 5, sub-section (5).

(2) Where the owners of the undertaking or the Board . . . notify the arbitration tribunal that they are unable to agree—(1) as to the amount of the consideration for the transfer of the undertaking . . . the amount of the consideration shall be determined by the arbitration tribunal: section 6 (*d*) (i). And

(3) The Arbitration tribunal, in determining the consideration to be paid by the Board, in default of agreement between the Board and the owner, for any undertaking or any part of an undertaking, shall have regard to all the circumstances of the case: section 9, sub-section (1) (*a*).

These provisions, in my opinion, adequately safeguard the position of the plaintiff, and on a full consideration of the whole case I have come to the conclusion that the appeal should be allowed.

Solicitor for the appellants: *J. Dunville Coates.*
Solicitors for the respondents: *Wheeler & McCutcheon.*

J. R.

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PORTRUSH URBAN DISTRICT COUNCIL v. MAIRS.
PORTRUSH URBAN DISTRICT COUNCIL v. SLOAN (1).

Local Government—Right of Local Authority to enter upon lands outside its district, for the purpose of measuring, making plans and taking levels, to ascertain suitability of lands for acquisition under Public Health (Ireland) Act, 1878, *as site of reservoir for water supply—Public Health (Ireland) Act,* 1878 (41 *&* 42 *Vict., c.* 52), *sections* 271, 35, 61 (2), 64—*Public Health (Ireland) Act,* 1896 (59 *&* 60 *Vict., c.* 54), *section* 2.

A local urban authority desired to enter lands outside its district and to make borings, for the purpose of measuring, surveying, making plans, and taking levels, to ascertain whether the lands were suitable to be acquired by them as the site of a new reservoir in connection with the water supply of their district.

The justices had made an order that the defendants were to admit the plaintiff authority to enter upon the lands for such purposes. The defendants, however, appealed to the County Court Judge, who held that section 271 of the Public Health (Ireland) Act, 1878, under which the application was brought, did not apply to lands outside the district of the authority. He allowed the appeals, but stated a special case for the opinion of the King's Bench Division as to whether he was right in holding as he did.

Held, by the King's Bench Division, (Moore, L.C.J., and Brown, J.), that the County Court Judge was right in holding that section 271 of the Public Health (Ireland) Act, 1878, did not enable the plaintiffs to enter upon lands outside their district.

SPECIAL CASE stated by the Acting County Court Judge for the Ballymena Division of the County of Antrim.

The Special Case stated was as follows:—

This is a special case stated under 41 & 42 Vict., chap. 52, sec. 269 (7) by Arthur Henry Bates, K.C., County Court Judge for the County of Antrim, sitting at Quarter Sessions at Ballymena, on the application of the respondents, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland, on the question of law hereinafter set forth.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

Five appeals were entered for hearing and each appeal was against an order made by the justices at the petty sessions court at Portrush in the County of Antrim, on 20th day of November, 1935, upon the hearing of two summonses in which the Portrush Urban District Council and William I. Cunningham, Clerk to the said Council were complainants, and Robert Mairs, Hugh Mairs, William Mairs and Robert Stinson in the one summons, and Abraham J. Sloan in the other summons, were the respective defendants. The said appeals were by consent heard together as the facts were agreed upon and the same question arose in each case, and it has been agreed by the parties that one case should be stated to cover all five appeals.

The order in each case was made by the said justices under 41 and 42 Victoria, chapter 52, section 271, ordering the appellants and each of them to admit the Portrush Urban District Council by themselves, their surveyors, workmen or servants to the defendants' respective lands in the townland of Corbally, in the County of Antrim, for the purposes specified in the said orders.

The following facts were agreed to by the parties upon the hearing of the said appeals :—

(*a*) The lands the subject of the said orders appealed against are all outside the Urban District of Portrush, and are situate about one and three-quarter miles from the town of Portrush.

(*b*) No provisional order has been made in respect of the said lands under section 203 of the Public Health Act, 1878.

(*c*) The respondents had not sought nor obtained the consent of the sanitary authority within whose area and jurisdiction the appellants reside or within whose area the townland of Corbally is situate, to enter upon the said lands, nor had the respondents complied with the provisions of sections 35 to 37 of the Public Health (Ireland) Act, 1878.

(*d*) The respondents desired to enter the said lands and to make borings thereon for the purpose of measuring. surveying, making plans and taking

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levels of the said lands in order to ascertain whether the said lands were suitable to be acquired by them under the Public Health (Ireland) Act, 1878, as the site of a new reservoir intended to be made by them in connection with the water supply of Portrush.

It was agreed that a new reservoir was necessary for the proper supply of water to Portrush and that the operations above referred to were necessary to enable the respondents to ascertain the suitability of the said lands for the purposes aforesaid.

It was contended by the appellants :—

(1) That section 271 of the Public Health (Ireland) Act, 1878, under which the orders appealed from were made does not empower a sanitary authority to enter upon lands outside its own district.

(2) That the intended construction of a reservoir by the respondents outside their own district was not a matter relative to which the powers of a sanitary authority under section 271 of the Public Health (Ireland) Act, 1878, could be enforced, and that the said orders were accordingly made without and in excess of jurisdiction.

Reference was also made to section 9 of the Public Health (Ireland) Act, 1878.

It was contended on behalf of the complainants that the powers conferred by the said section 271 referred to any lands whether situate within or without the district of the sanitary authority and that the intended construction of a reservoir was a matter relative to which the said powers might be exercised.

Reference was made to sections 61 and 202 of the Public Health (Ireland) Act, 1878.

I was of opinion that the appellants' contention was correct and that in the circumstances of the cases and each of them, the said section 271 did not apply to lands outside the district of the sanitary authority and accordingly I allowed each of the said appeals with costs, and refer to my ruling as entered in the Crown Book.

The question for the King's Bench Division is whether I was right in law in my said determination and if not what shall be done in the premises.

I state this case under section 269 (7) of the Public Health (Ireland) Act, 1878, at the request of the respondents.

Porter, K.C. and *Nicholson* for the Portrush Urban District Council :—

The question to be decided is, whether the Urban District Council have power to acquire the lands for the purpose of making trial borings.

The only section which gives a right of entry is section 271 of the Public Health (Ireland) Act, 1878.

Waterworks are generally situate outside the boundary of the Urban District.

Section 271 seems to have been specially designed to deal with the case where the local authority is seeking to enter for the purpose of making borings with a view to constructing waterworks.

We submit that section 271 enables a local authority to enter upon lands either within or without its district.

We rely upon *Withington Local Board of Health v. Corporation of Manchester* (1), where it was held that the local authority were empowered under section 131 of the Public Health Act, 1875, to establish a hospital outside their own district without the consent of the local authority of the district in which they established it, and that section 285 requiring the consent of the local authorities of adjoining districts, had no application to such a case.

It is apparent from section 63 of the Public Health (Ireland) Act, 1878, that it was contemplated that waterworks should be built outside the area of the local authority.

The logical result of the argument for the defendants is that the reservoir cannot be constructed outside the area of the local authority.

[They also referred to *Jones v. Conway and Colwyn Bay Joint Water Supply Board* (1).]

(1) [1893] 2 Ch. 19, 603.

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Murphy, K.C. and *J. D. Chambers* for the respondents :—

The Portrush Urban District Council cannot without some express authority trespass into the jurisdiction of another local authority.

We submit that the law is correctly stated in *Vanston's Public Health* (second edition), page 83, in the following terms : " If a sanitary authority desire to deal with or " affect the rights of owners of land in an adjoining " district, they must either comply with the provisions " of ss. 35-37 of this Act (the Public Health (Ireland) " Act, 1878), or, under the power given by s. 2 of the " Public Health (Ireland) Act, 1896 (59 & 60 Vict., " c. 54), they may make terms with them by agreement " with the consent of the sanitary authority of such " adjoining district."

No decided case can be cited where this high-handed procedure has been adopted. The Portrush Urban District Council have not adopted the correct procedure.

In *Withington Local Board of Health v. Corporation of Manchester* (1), Chitty, J., was dealing with a section (section 131) that differs entirely from section 271 of the Public Health (Ireland) Act, 1878.

In section 271 there is nothing to safeguard the rights of other sanitary authorities. In every section dealing with outside jurisdictions there is a safeguarding clause.

The real *ratio decidendi* of *Withington Local Board of Health v. Corporation of Manchester* (1), is that where property had been acquired outside the district of the local authority, to prevent the defendants from succeeding it was necessary to show some prohibition restraining the defendants from making use of their own property.

There is nothing in section 271 which enables the powers conferred by that section to be exercised outside the area of the local authority.

It is essential if the Portrush Urban District Council is to be entitled to enter upon lands outside its own

(1) [1893] 2 Ch. 19.

district, that the power to do so should be expressly conferred by the Legislature.

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Porter, K.C. (in reply):—

The works referred to in section 271 do not include the construction of waterworks, nor the laying of water mains, they are simply preliminary borings.

The adjoining Rural District Council has no water rights that are being interfered with. The water rights belong to individuals not to the Rural District Council.

We submit that section 271 applies to cases where no express power has been given to carry out works outside the area of the local authority.

We rely on section 24 of the Public Health (Ireland) Act, 1878. It is not necessary to have the consent of the local authority, all that is necessary is a decision of the justices.

We rely most strongly on *Withington Local Board of Health v. Corporation of Manchester* (1), which we submit cannot be distinguished from the present case.

SIR WILLIAM MOORE, L.C.J.

May 7.

MOORE, L.C.J.: A very short point arises in this case. We have been helped considerably by members of the Bar and references to many sections of this large code of Public Health Acts, but after all the point for us to decide, and as decided by the learned County Court Judge, is a comparatively narrow one, namely: Whether section 271, which gives a right of entry for the purpose of examination of lands, making plans, etc., as therein set out, applies to lands outside the area of the Urban Council. There is not the slightest question that it must apply to all lands within their area, but whether it can be extended to lands outside their own area is what we have to decide. The Act itself is silent as to what lands the section does apply to. It, the section, says nothing about "within the area, and without the area." I think we ought to look, as we have been requested to do, at the scope of the Act. The Urban Council is the sanitary authority, and every

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sanitary authority is in control of its own district and brooks no interference from outsiders. Its powers as such authority are without limitation within its own area and, so far as that goes, correspondingly it would have no jurisdiction to infringe the rights of any other sanitary authority, adjoining or otherwise.

It is plain from the Statute that jurisdiction when necessary, as in the case of sewers and water supply, is specially given to the sanitary authority to carry on these works outside their own area. The jurisdiction is specially given to them in terms in many sections of the Act, especially those dealing with sewerage and water supply. If the power already exists without such provision, it was quite unnecessary to confer such special power. We find these powers given in section 35, expressed in the words " within or without " the district. Section 61, sub-section 2, also gives jurisdiction " within or without " the area. Section 64 is the same thing. It was found, perhaps, that this is not sufficiently elastic. Let us take the further jurisdiction which was given to them by section 2 of the Act of 1896. It is protecting the right of the sanitary authority to have control over their own area but allowing them to consent to an adjoining authority coming in. Had the Portrush Council got the consent of the adjoining authority, the Ballymoney Rural Council, under section 2 of the Act of 1896, they would have been in no trouble of any sort. It will be noted that this power is limited to an adjoining district.

I think these are special powers, given by special sections for a special purpose, are expressly given to the sanitary authority in pursuance of the Public Health code, and I find that they are omitted in section 271 under which the present application is made. The omission of these special words leaves, in our judgment, section 271 without special power.

There is no jurisdiction in the Portrush Council to deal with these matters under the provisions of section 271 unless they have obtained the consent of the adjoining authority under section 2 of the Act of 1896.

This is the conclusion I have arrived at. I think the County Court Judge was quite right in saying

they had no power to enter on these lands in the way in which they purported to do, and we will so answer the question put to us and affirm his decision with costs, which we measure at Twenty five guineas. [Unrevised.]

BROWN, J.: I agree. I have nothing to add.

Solicitors for the appellants: *Macaulay, O'Neill & Martin.*

Solicitors for the respondents: *Wray & Baxter.*

J. McC.

C.A. 1936.

June 22.

PORTRUSH URBAN DISTRICT COUNCIL v. MAIRS. PORTRUSH URBAN DISTRICT COUNCIL v. SLOAN (No. 2) (1).

Practice—Withdrawal of Appeal—Revocation of Withdrawal.

The P. Urban District Council, having given notice of an appeal against an order made by the King's Bench Division, wrote to the respondents stating that they had decided to withdraw their appeal. The respondents assented to the withdrawal. Subsequently the solicitors for the appellants wrote purporting to cancel their withdrawal of the appeal, and stated that they intended to proceed with the appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ.) that the appellants had no power to revoke their withdrawal of the appeal, and that the appeal could not be heard.

THIS was an appeal by the Portrush Urban District Council against an order made by the King's Bench Division.

By this order which was made on the 7th May, 1936, it was ordered that the County Court Judge for the Ballymena division of the County of Antrim was correct in holding that section 271 of the Public Health (Ireland) Act, 1878, did not apply to lands outside the district of the Sanitary Authority—the Urban District Council of Portrush.

The County Court Judge had stated a case for the opinion of the King's Bench Division under section 269 (7) of the Public Health (Ireland) Act, 1878, as to whether he was right in law in holding as he did.

The King's Bench Division answered the question in the affirmative and affirmed the decision of the County Court Judge.

On the 26th May, 1936, the complainants, the Urban District Council of Portrush, gave notice of appeal from the order of the King's Bench Division.

On 9th June, 1936, the plaintiff's solicitors wrote to the defendants' solicitors as follows :—

"Confirming our 'phone communication with "Mr. Baxter to-day, we wish to inform you that

(1) In the Court of Appeal before Andrews and Best, L.JJ.

" our clients have instructed us not to proceed with " the appeal in the above matter."

The defendants' solicitors replied to this on the next day as follows :—

" We are in receipt of your letter of 9th inst. " herein and we note that you are not proceeding " with the appeal.

" Please let us have cheque for 45 guineas costs " allowed to date."

On the 17th June, 1936, the plaintiffs' solicitors wrote to the defendants' solicitors a letter in which they stated :—

" As we informed your Mr. Baxter this morning— " in view of the fact that it would be necessary to " apply to the Court to withdraw the appeal from the " decision of the King's Bench Divisional Court " herein our clients have now decided to proceed " with the appeal instead of withdrawing same.

" We enclose copy Index of the Books lodged for " the hearing of the appeal."

The appeal came on for hearing.

The appeal having been opened, Murphy, K.C., for the respondents raised the preliminary objection that the plaintiffs had withdrawn their notice of appeal and could not afterwards be allowed to proceed with it.

The Court decided to hear the preliminary objection.

Murphy, K.C. and *J. D. Chambers* for the respondents :—

The law is correctly stated in the *Annual Practice*, 1936, page 1252, as follows :—" Appellant withdrawing " his notice of appeal with respondent's consent, cannot " revoke such withdrawal, but must apply for leave to " give fresh notice of appeal. *Watson v. Cave* (No. 2) (1)."

It is stated in *Wylie*, p. 781, that where an appeal is formally withdrawn, the withdrawal cannot be rescinded. *Watson v. Cave* (No. 2) (1).

We rely on *In re West Devon Great Consols Mine* (2). In that case some contributories appeared before the vice-warden to oppose the admission of certain claims

(1) 17 Ch.D. 23. (2) 38 Ch.D. 51.

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in a winding up. The vice-warden decided that the claims must be admitted. The counsel of the opposing contributories undertook not to appeal, and their costs were given them out of the estate. Before the order was passed and entered, they applied to have this undertaking omitted, on the grounds that counsel could not give a consent not to appeal, that he could not give a consent after a decision on the merits, and that the decision was given by mistake, as the decision of the vice-warden turned on a resolution of the company which they had not seen, and that if they had known its terms the consent would not have been given. It appeared, however, that the resolution had been read in Court on a former day.

It was held by the Court of Appeal, that counsel had authority to consent not to appeal, and that as the opposing contributories had had an opportunity of becoming acquainted with the terms of the resolution, there was no such mistake as would entitle them to withdraw their consent.

We submit there had been a definite withdrawal of the notice of appeal.

Nicholson (with him *Porter, K.C.*) for the appellants :

We submit that the appeal cannot be withdrawn without the leave of the Court.

Cotton, L.J., expressed the opinion in his judgment in *In re West Devon Great Consols Mine* (1), that a consent could be withdrawn on the ground of mistake or surprise, or for some other sufficient reason.

In *Harvey v. Croydon Union Rural Sanitary Authority* (2), Pearson, J., stated in his judgment that "in *Rogers v. Horn* (3) the late Master of the Rolls "distinctly decided that an order by consent might "be varied at any time before the order was passed "and entered."

The notice of appeal cannot be stayed until it comes before the Court.

A letter is not on a very formal footing.

(1) 38 Ch.D. 51, 54.
(2) 26 Ch.D. 249, 253.
(3) 26 W.R. 432.

We submit that the respondents have not been prejudiced, and that it is a question more for costs.

[BEST, L.J.: It is more than a mere question of costs.]

It is the duty of the Court to safeguard the rights of both parties. The withdrawal of the notice withdrawing the appeal was perfectly regular.

The point of time when the appeal is irrevocably withdrawn is when it comes before the Court of Appeal.

Even if the law is correctly stated in *Watson v. Cave* (No. 2) (1), it is still open to the Court to allow the appellants to serve new notice of appeal.

We submit that Pearson, J.'s, judgment in *Harvey v. Croydon Union Rural Sanitary Authority* (2), is inconsistent with the decision in *Watson v. Cave* (No. 2) (1).

We submit that the appeal should be heard, subject to the Court considering what order should be made as to costs.

Murphy, K.C. (in reply):—

Once an appeal has been withdrawn it cannot be suddenly sprung on the Court again. Litigants cannot be allowed to withdraw their appeals from day to day. In the present case there was an unequivocal withdrawal.

We ask the Court to deal with the case as *Watson v. Cave* (No. 2) (1) was dealt with by the Court of Appeal in England.

ANDREWS, L.J.

ANDREWS, L.J.: We have carefully considered this matter and are clearly of the opinion that the point at issue is governed by the decision in *Watson v. Cave* (No. 2) (1).

The King's Bench Division made an order on 7th May last to the effect that section 271 of the Public Health (Ireland) Act, 1878, under which the orders of the Justices appealed from were made, does not empower a sanitary authority to enter upon lands outside its own district.

(1) 17 Ch. D.23. (2) 26 Ch.D. 249, 252, 253.

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ANDREWS, L.J.

An appeal from the decision of the King's Bench Division was served on 26th May, but before the case appeared in the appeal list, namely on 9th June, a letter was sent by the appellants' solicitors to the respondents' solicitors purporting to withdraw the appeal. The respondents' solicitors by letter of the following day assented to that course being taken. (His Lordship then read the two letters, and added that upon them there was a definite contract, and that the appeal was at an end.)

Subsequently, on 17th June, the appellants wrote a further letter to the respondents in which they stated that they proposed to proceed with the appeal.

There is no evidence of any mistake of a serious nature within the principle referred to in *Watson v. Cave* (No. 2) (1), in consequence of which the appellants ought to be allowed to withdraw their notice of withdrawal. If there had been such evidence we would have entertained an application for leave to give fresh notice of appeal.

An order must be made dismissing the appeal.

BEST, L.J.

BEST, L.J. : I agree that the point that arises in the present case has already been decided in *Watson v. Cave* (No. 2) (1). There was no mistake on the part of the appellants, there was simply a change of mind.

Solicitors for the appellants : *Macaulay, O'Neill & Martin.*

Solicitors for the respondent : *Wray & Baxter.*

J. McC.

(1) 17 Ch.D. 23.

LEADER v. THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND (1).

K.B.D. 1936.

July 6.

Valuation Acts—Rateable Premises—Dwelling House, Offices and Lands—Dwelling House vacant—Whether Hereditaments could be separately valued—Unit of Valuation—Valuation (Ireland) Act, 1852 (15 & 16 *Vic., c.* 63) *sections* 11 *and* 12–*Valuation Acts Amendment Act (Northern Ireland)*, 1932 (21 & 22 *Geo.* 5, *c.* 26) *section* 6.

The respondent held premises consisting of a dwelling-house, offices and lands, the lands constituting the more important part of the hereditament. The lands were valued by the Commissioner of Valuation at £233, the dwelling-house at £36 15*s.* 0*d.*, and other hereditaments at £60, a total of £329 15*s.* 0*d.* The premises were all held under one title.

The respondent appealed from the decision of the Commissioner of Valuation to the County Court Judge. He asked in his notice of appeal that the valuation of £60 placed on the dwelling-house should be put and shown as a separate unit on a separate line in the List of Valuations.

The County Court Judge found as a fact that the dwelling-house was vacant.

The County Court Judge held that by virtue of section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, the valuation of £60 placed on the dwelling-house should be distinguished in the Valuation List as a separate unit of valuation, and should be entered on a separate line, but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Andrews, L.J., and Brown, J.), that the principle underlying the decision of the Court in *Switzer v. Commissioner of Valuation* ([1902] 2 I.R. 275) applied as the premises included in the valuation under appeal were held by the respondent under one title, and that the hereditaments could not be separately valued: Held, further, that section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, had not effected a change in the unit of valuation.

CASE STATED pursuant to the provisions of section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, by the County Court Judge and Chairman of Quarter Sessions for

(1) In the King's Bench Division before Andrews, L.J., and Brown, J.

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the County of Armagh on the application of the Commissioner of Valuation for Northern Ireland, the said Commissioner being dissatisfied with the determination (hereinafter set forth) as being erroneous in point of law.

This case relates to an appeal by Thomas Henry Leader (hereinafter called the appellant) against the entry made in the Valuation Lists in respect of the appellant's lands and premises situated in the Townland of Drumnasoo, Electoral Division of Hockley, and County of Armagh, by the Commissioner of Valuation in the course of the general revaluation directed by the Valuation Acts Amendment Act (Northern Ireland), 1932.

The appeal was heard on the 31st day of January, 1936, at Armagh at the Quarter Sessions for the County of Armagh.

The premises in question are held under one title and are included (with other lands not the subject of this appeal) in Folio No. 11906 County of Armagh. The appellant is the registered owner of the lands comprised in the said folio.

The premises comprise a dwelling house, offices and land with a total valuation of £329 15*s.* 0*d.* as set out in the said notice of appeal. It was stated in evidence on behalf of the appellant that the dwelling-house was vacant and had been vacant for about four years, that the lands were practically all let for grazing or cutting for the season to adjoining farmers, and that there was only a very small area which could be regarded as curtilage. For the Commissioner of Valuation evidence was given that the kitchen and one bedroom in the dwelling-house were occupied by a caretaker in the employment of the appellant. Apart from this the evidence given on behalf of the appellant was not disputed. I found as a fact that the dwelling-house was vacant.

No objection was taken by the appellant to the amount of the valuation neither did he challenge the correctness of the apportionment as set out in the said entry in the valuation lists. He asked in the said notice of appeal that the valuation of £60 placed on

the hereditaments (other than agricultural industrial or freight-transport hereditaments) should be placed on a separate line in the list of valuations.

For the appellant it was contended that by section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, dwelling-houses were now being valued separately from lands and other buildings and that the dwelling-houses hould be shown on a separate line in the lists, that is, separate from the lands and other buildings.

For the Commissioner it was contended :—

(*a*) That section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, did not alter the previous law as to what was the unit for rating purposes.

(*b*) That the valuations of land and agricultural buildings were freed from rates by the Local Government Act (Northern Ireland), 1929, but were fixed in amount by section 3 of the Rating and Valuation Apportionment Act (Northern Ireland), 1928, and the First Schedule to the Valuation Acts Amendment Act (Northern Ireland), 1932.

(*c*) That the directions contained in section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, only had regard to the method of valuation of dwelling-houses ; and that subject to these directions, the whole had to be entered in the lists as one unit and could not be separately entered in the lists.

Counsel for the Commissioner referred to the case of *Wilson v. Kennedy* (1), and for the appellant the statement of Mr. Justice Brown in this case that the rated occupier could by applying to the Commissioner have the dwelling-house placed on a separate line was referred to.

The County Court Judge held that by virtue of section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, the valuation of £60 placed on the dwelling-house should be distinguished in the valuation

(1) [1935] N.I. 185.

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lists as a separate unit of valuation and should be entered in the said lists on a separate line.

The question for the Court is:—Whether I was right in so holding.

E. Warnock, K.C. and *W. Miller* for the Commissioner of Valuation:—

All the hereditaments must be entered in the list as one unit, and cannot be separately entered.

We rely on the words used by Palles, C.B., in his judgment in *Switzer v. Commissioner of Valuation* (1), where he said: "in my opinion the characteristic of a "tenement to be separately valued, is a tenement, all "of which is in the occupation of the same occupier, "under the same immediate lessor, under one contract "of tenancy."

Section 6 of The Valuation Acts Amendment Act (Northern Ireland), 1932, does not alter the unit of valuation, it preserves the two methods of valuation.

That section is no authority for the contention presented in the Court below on behalf of the respondent that the dwelling-house should be shown on a separate line in the list, and that dwelling-houses should now be valued separately from lands and other buildings.

Sheil for the respondent:—

Section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, effected a change in the unit of valuation, and there should now be a separate valuation for the dwelling-house.

I rely on the words used by Brown, J., in *Wilson v. Kennedy* (2), where he said that: "it was open to the "defendant to have applied to have the land valued "separately."

It does not necessarily follow that in the present case the premises would be held under one lessor and one title.

We submit that the present case does not come within the decision in *Switzer v. Commissioner of Valuation* (1).

(1) [1902] 2 I.R. 275, 282. (2) [1935] N.I. 185, 193.

ANDREWS, L.J.: This matter comes before us on a case stated by the County Court Judge of Armagh.

The premises which the appellant holds consist of a dwelling-house, offices and lands. It is apparent from the valuation that the lands constitute the more important part of the hereditament, the lands being valued at £233, the dwelling-house at £36 15*s*., and other hereditaments at £60—a total of £329 15*s*.

The County Court Judge held as a fact that the dwelling-house was vacant at the time of his decision, and this finding of course could not be challenged before us.

The matter to be determined is, what is the proper unit of valuation of the premises. Was the County Court Judge right in holding, as the appellant contended, that there were two units, one consisting of the lands and farm buildings, and the other of a vacant dwelling-house. Hitherto they have always been regarded for valuation purposes as one.

Section 11 of the Valuation (Ireland) Act, 1852, sets out certain principles to be followed in regard to the valuation of buildings and lands. That section does not, however, state clearly the unit of valuation.

This question was considered by the King's Bench Division in *Switzer v. Commissioner of Valuation* (1), in which Palles, C.B., stated the law as follows :—" In my " opinion, the unit of valuation of premises in the " occupation of tenants is, such hereditaments, of the " description in section 12 of the Act of 1852, as are in " the occupation of the same occupier, holding from the " same immediate lessor, under the same lease or " contract of tenancy. In this definition the ex- " pressions ' occupier ' and ' immediate lessor ' may " include a plurality of persons being joint occupiers, " or joint immediate lessors, who between them may " constitute one occupier or one immediate lessor. " But, if premises (1) are in the occupation of several " distinct occupiers ; or (2) although in the occupation " of the same persons, are held under separate im- " mediate lessors ; or (3) although in the occupation of " the same person, and held under the same immediate

(1) [1902] 2 I.R. 275, 281.

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ANDREWS, L.J.

"lessor, are so held under several distinct leases or "contracts of tenancy; *each* of those premises is a "separate rateable hereditament, and more than one "of them cannot be included in any one single valua- "tion. In other words, in my opinion the char- "acteristic of a tenement to be separately valued, is a "tenement, all of which is in the occupation of the "same occupier, under the same immediate lessor, "under one contract of tenancy."

The principle underlying the decision of the Court in *Switzer v. Commissioner of Valuation* (1) applies to the present case, in which all the premises included in the valuation under appeal are held by the appellant under one title.

The appellant, however, further submitted to the County Court Judge and also to this Court that section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, effected a change in the unit of valuation, and that there should now be a separate valuation for the dwelling-house, in respect of which no rates would be payable.

The learned County Court Judge accepted this argument, but submitted this case for the opinion of the Court.

I have read section 6 several times with great care, but am unable to find in it anything to justify the conclusion that the Legislature intended by that section to create a new unit of valuation. It merely brings the agricultural and the non-agricultural portions of a hereditament into closer relation with one another when the valuation of the hereditament as a whole is being determined.

The case of *Wilson v. Kennedy* (2) has been relied on by the applicant in support of his contention; but the point at issue in that case was quite different from the question in the present case; and the view which Brown, J., expressed at page 193 as to its having been open to the defendant to have applied to have the land valued separately had not been argued, and, being unnecessary for the decision, is not binding on this Court.

(1) [1902] 2 I.R. 275. (2) [1935] N.I. 185.

The decision of the learned County Court Judge was in my opinion wrong, and the question submitted to us must be answered accordingly.

BROWN, J.: I agree with the judgment of Andrews, L.J. Reference has been made to the decision given by Mr. Justice Megaw and myself in *Wilson v. Kennedy* (1). That case, however, was not under the Valuation Acts. The Valuation Acts were not in issue. It was assumed that there could be a separate valuation for the farm house. Any reference to separate valuation in that case is of no value in the present case.

Solicitor for the Commissioner of Valuation: *J. H. B. Gunning.*

Solicitors for the respondents: *Monroe & Anderson.*

J. McC.

(1) [1935] N.I. 185.

C.A. 1936.

Oct. 19.
Nov. 6.

THE ROYAL VICTORIA HOSPITAL v. THE LONDON GUARANTEE AND ACCIDENT CORPORATION, LIMITED (1).

Insurance (Motor)—Accident—Driver Insured—Voluntary Passenger injured—Right of Hospital to recover from Insurance Company expenses reasonably incurred in treating voluntary passenger, injured by negligence of driver—Liability in respect of which no obligation to insure imposed by statute—Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. 24) sections 12 (1), 6 (1)—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 15) sections 15, 45.

D. H., a voluntary passenger (not carried for hire or reward or by reason or in pursuance of a contract of employment) in A. C.'s private motor car, was injured in a collision between the car and an omnibus. He was taken to the R. V. Hospital where he remained for treatment for over two months as an intern patient. He sued A. C. and the owners of the omnibus for damages and recovered against A. C., the claim against the omnibus being dismissed. No claim was made for hospital expenses.

The R. V. Hospital sued for these expenses the insurers of A. C., who had, pursuant to A. C.'s policy, paid the amount of the judgment and the Recorder of B. dismissed the civil bill.

The R. V. Hospital appealed and Best, L.J., stated a case for the opinion of the Court of Appeal.

Held, by the Court of Appeal (Andrews and Best, L.JJ., Moore, L.C.J., dissenting) that, as the defendants were "authorised insurers" who had made a payment in respect of the voluntary passenger's injury under a policy issued under Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, they were bound by the terms of section 12 (1) of that Act, to pay also the plaintiff's expenses of the voluntary passenger's treatment in the hospital.

CASE STATED by Best, L.J., on the hearing of an appeal from a dismiss by the Recorder of Belfast of a civil bill, for the opinion of His Majesty's Court of Appeal in Northern Ireland.

This suit was commenced by a civil bill, dated the 20th April, 1936, whereby the plaintiffs sought to recover from the defendants the sum of £25 17*s.* 6*d.*, alleged to be due to the plaintiffs in respect of the

(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

expenses of the hospital treatment of one Desmond Haldane and to be payable by the defendants under the provisions of section 12 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, as amended by section 45 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934.

The civil bill was heard by the Recorder of Belfast who dismissed it, whereupon the plaintiffs appealed.

The appeal came on for hearing on the 27th July, 1936. MacDermott, K.C., appeared for the plaintiffs; Fox for the defendants. The facts were admitted and are as set forth in the following paragraphs.

The plaintiffs are a Body incorporated by Royal Charter. They carry on a voluntary hospital in the City of Belfast.

The defendants are an Insurance Company. Their business includes insurance against claims in connection with road vehicles and they are, and were, at all material times, " authorised insurers " for the purposes of Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (hereinafter called " the Act of 1930 ") as amended by the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (hereinafter called " the Act of 1934 ").

On the 14th April, 1935, a collision occurred in a street in Belfast between a private motor car owned and driven by one Alan Carswell and a motor omnibus belonging to H. M. S. Catherwood, Limited. At the time of the accident the said Desmond Haldane was being carried as a passenger in Mr. Carswell's car, but not for hire or reward or in pursuance of any contract. Mr. Haldane was severely injured in the collision and two of the fare-paying passengers in the motor omnibus were also injured.

Mr. Haldane and the omnibus passengers were taken to the plaintiffs' hospital on the day of the accident and Mr. Haldane remained there as an intern patient and received treatment until the 22nd June, 1935.

Mr. Haldane then brought an action in the High Court to recover damages for his personal injuries against Mr. Carswell and H. M. S. Catherwood, Limited. Negligence was alleged against both these defendants.

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Mr. Haldane's claim did not include any sum in respect of the treatment given him at the Royal Victoria Hospital.

The said action was heard before the Lord Chief Justice and a special jury on the 20th and 21st November, 1935. It resulted in a verdict and judgment for £650 for Mr. Haldane against Mr. Carswell alone with costs, the claim against H. M. S. Catherwood, Limited, being dismissed.

Mr. Carswell was insured against this verdict and judgment by a policy issued by the present defendants and they duly paid the amount thereof to Mr. Haldane.

Part II of the Act of 1930 makes provision against third-party risks arising out of the use of motor cars. Section 6 thereof enacts (*inter alia*) that it shall be unlawful for any person to use a motor car on a public highway unless there is in force in relation to such user such a policy of insurance, or such a security, in respect of third-party risks as complies with the requirements of Part II of the said Act. These requirements are set out in section 7 as amended by section 15 of the Act of 1934. By sub-section (1) (*b*) thereof such a policy of insurance must cover "any "liability which may be incurred by the insured in "respect of the death of, or bodily injury to, any "person caused by or arising out of the use of the "motor car on a public highway," but by proviso (ii) of the same sub-section it is provided that such a policy shall not be required to cover liability in respect of the death of or bodily injury to persons being carried on the motor car at the time of the occurrence and not for hire or reward or by reason or in pursuance of a contract of employment.

The said policy issued by the defendants satisfied the requirements of Part II of the Act of 1930 as amended by the Act of 1934. In addition it covered liability in respect of passengers who were not carried for hire or reward or pursuant to contract. It was under this cover that the defendants became liable to pay the amount of Mr. Haldane's verdict and it was admitted that had the policy not covered Mr. Carswell's liability to Mr. Haldane it would still have complied

with the statutory requirements. The defendants having delivered the said policy also issued to Mr. Carswell, in accordance with the said Acts, a certificate of insurance.

By section 12 (1) of the Act of 1930, as amended by section 45 of the Act of 1934, it is provided as follows (omitting inapplicable words):—

"Where any payment is made by an authorised "insurer under a policy issued under this Part of "this Act . . . in respect of . . . bodily injury to any "person arising out of the use of a motor car on a "public highway, and the person who has so . . "been bodily injured has to the knowledge of the "authorised insurer . . . received treatment in a "hospital in respect of the . . . bodily injury so "arising, there shall also be paid by the authorised "insurer . . . to such hospital, the expenses reasonably "incurred by the hospital in affording such treat-"ment to an amount not exceeding £50 for each "person so treated: provided that this section shall "not apply in any case where a charge has been "made by the hospital in respect of such treatment."

After Mr. Haldane's damages had been paid by the defendants the plaintiffs applied to them for payment of the hospital expenses by letter, dated 28th December, 1935.

The defendants' reply thereto, dated 31st December, 1935, denied liability to pay such expenses.

Mr. Haldane was treated by the plaintiffs to the defendants' knowledge. The plaintiffs did not make any charge in respect of such treatment and the sum they sued for was admitted to be their "expenses "reasonably incurred" in affording treatment to Mr. Haldane. The only issue between the parties was the question of law referred to in the following paragraphs.

For the plaintiffs it was contended that as the defendants were "authorised insurers" and had made a payment in respect of Mr. Haldane's injury under a policy issued under Part II of the Act of 1930 they were bound, by the terms of section 12 (1) of the said Act, to pay the plaintiffs' expenses of Mr. Haldane's treatment in addition.

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For the defendants it was contended that section 12 (1) of the Act of 1930 only bound insurers to pay hospital expenses where they had made a payment in respect of a liability required to be covered by the policy; and that as Mr. Carswell's liability to Mr. Haldane did not require to be covered by the policy they were under no liability under section 12 (1).

The question for the Court is:—Are the plaintiffs entitled in law to recover from the defendants the sum sued for under section 12 (1) of the Act of 1930, having regard to the facts above set out?

When the case came before the Court of Appeal, Best, L.J., pointed out that the case had already come before him on appeal from the Recorder of Belfast, and he had stated the case for the opinion of the Court. He had not, however, formed any opinion on the point to be decided.

Both parties agreed that there could not be any objection to Best, L.J., sitting as a member of the Court.

MacDermott, K.C. and *Condy* for the Royal Victoria Hospital:—

We say that all the circumstances requiring payment by the defendants are present. The statutory liability rests on the insurers. Those who are liable to pay, or who should pay, should also be liable for the costs of hospital treatment.

The Recorder reads the words "under a policy "issued under this Part of this Act" in section 12 (1) of the 1930 Act as if they read a policy required by the Act. We submit that "a policy issued under this "part of this Act" means a policy which complies with the Act, irrespective of whether or not it does more than cover matters required by the Act. We contend that section 12 (1) of the Act of 1930 means what it says. The defendants really ask the Court to amend this section. This policy satisfied the requirements of the Act. The construction sought to be put upon section 12 (1) by the defendants would require that the section should read "where any payment is made by

" an authorised insurer in respect of a liability required " to be covered by a policy issued under this Part of " this Act." But the section does not say this.

The relevant rule of construction is set out in *Craies on Statute Law*, third edition, page 66, where it is stated: " The cardinal rule for the construction of " Acts of Parliament is that they should be construed " according to the intention of the Parliament which " passed them." At page 67 it is stated: " In a court " of law or equity, what the Legislature intended to be " done or not to be done can only be legitimately " ascertained from what it has chosen to enact, either " in express words or by reasonable and necessary " implication."

In *Salomon v. Salomon & Co.* (1), Lord Watson said: " Intention of the Legislature is a common but very " slippery phrase, which, popularly understood, may " signify anything from intention embodied in positive " enactment to speculative opinion as to what the " Legislature probably would have meant, although " there has been an omission to enact it."

Maxwell on the Interpretation of Statutes (6th ed.), p. 406, states that " where the language of a statute, " in its ordinary meaning and grammatical con- " struction, leads to a manifest contradiction of the " apparent purpose of the enactment, or to some " inconvenience or absurdity, hardship or injustice, " presumably not intended, a construction may be put " upon it which modifies the meaning of the words, " and even the structure of the sentence."

Words can only be put into a section if it is reasonably necessary to imply them. There are no grounds for inserting such words in section 12 (1) of the 1930 Act. The legislature could have no possible reason for distinguishing between passengers carried in one vehicle and in another. The only relevant inquiry was in regard to the liability insured against. In the present case the greater risk was undertaken.

We rely strongly on section 15 (1) of the Act of 1930, which we submit strongly supports the plaintiffs' argument. There is no provision in the Act that any

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sum deposited is to be split up in any way. If any other construction were to be adapted, there would be one measure in cases such as the present and another measure in cases where deposits had been made under the Act.

We submit that no other construction is reasonable or necessary.

We submit that the plaintiffs are entitled to recover from the defendants these reasonably incurred hospital expenses.

Fox, for the defendants :—

I submit that a payment made under a policy issued under Part II of the Act means a payment made under a policy issued to comply with the requirements of Part II of the Act, and that the word "issued" must have that meaning. The words "issued to comply," or "issued in compliance with the Act," only contemplated particular provisions, and no other provisions, and were not intended to apply to any risk which was not intended to be insured against under the Act. Payment having been made in respect of a risk not required to be covered by the Act, the Act did not apply, and whether the words used were "issued under this part of this Act" or "for the "purposes of the Act" or "in respect of a liability," they all meant the same. The statutory liability to pay attaches only where there is a statutory liability to insure.

Section 12 (1) of the Act of 1930 must be construed in the light of what is contained in section 6 (1) of the same Act.

The policy did more than was required by the Act and the Statute did not apply. Section 15 (3) of the 1934 Act makes it quite clear that the Legislature intended that section to be of general application.

I submit that if it had been intended that section 12 (1) of the 1930 Act should be of general application, the same words would have been used as are found in section 15 (3) of the 1934 Act.

I strongly rely on section 18 (1) of the 1934 Act as showing the scheme of the Act. The claimant only

possesses the right in cases where the liability is covered by the Act. The Act did not apply to a voluntary liability accepted by the Insurance Company.

An insurance company may be asked to cover the risk of the wife of the owner of the car. The wife had no common law action, but it was perfectly open to the insurance company to insure her.

[BEST, L.J.: If the husband covers the wife's risk does not the insurer get the benefit of the premium, and if the wife is treated in hospital and cured six months sooner, do not the insurers get benefit from that ?]

If the insurer thought that the policy covered the expenses of hospital treatment of a voluntary passenger, the premium would be increased. It was no purpose of the Act that a voluntary passenger's risk should be covered. The Legislature in effect said payment is to be made in respect of persons who must be insured, but not in respect of any other person.

Section 15 proviso (ii) of the Act of 1934 excludes liability in respect of the death of or bodily injury to voluntary passengers.

When the relative sections are examined it will be found that the injured party whether a passenger or not, has only got certain rights laid down and specified in the Act itself. The Act created a statutory policy with statutory rights and statutory obligations. It was only so far as those statutory rights and obligations were concerned that the Act had effect. In the present case the policy did more than was required by the Act. In such a case the Act had no application, as it only contemplated liability under a statutory policy.

The purposes of the English Act and of the Northern Ireland Act are the same. The English Act was obviously intended to accomplish the same object.

I submit that it is clear from section 15 of the 1934 Act that a passenger has no right to proceed directly against an insurance company. It would be strange if a hospital could make a claim for hospital treatment in such a case, although the passenger himself could not have proceeded against an insurance company. It is opposed to common sense that a hospital should

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be in a better position than the passenger receiving hospital treatment.

I submit that the law is correctly stated in *The Law of Motor Insurance by Shawcross* (1935 ed.). "The "Road Traffic Acts, 1930 and 1934 (which are similar "to the Northern Ireland Acts) apply only to the motor "insurance made compulsory by the first of those Acts, "namely, insurance to cover the liability which may be "incurred by the assured in respect of the death or "bodily injury of a third party arising out of the use "of the insured vehicle on the road.

"The Road Traffic Acts do not apply to third parties "to whom the death or injury occurs whilst they are "either acting in the course of employment by the "assured or riding as voluntary passengers in his "vehicle." At pages 276 and 277 it is stated in *Shawcross* "that the Act of 1934 applies only to the "third party liabilities required to be insured by the "Act of 1930, namely, liabilities in respect of the "death of or bodily injury to certain classes of persons. "Like the Act of 1930, the Act of 1934 affects motor "insurance only to that extent."

By section 19 of the 1934 Act it is provided that a third party is not deprived of his cover by reason of the bankruptcy of the insurer, the voluntary passenger has no such right.

All these sections show quite clearly that it is only where there is compulsory liability to insure that the Act applies. It only applies to that liability which is not affected by the bankruptcy of the insurer.

The owner of the private motor car in this case was not obliged to answer the voluntary passenger when asked in what office was he insured.

I strongly rely on section 15 of the Act of 1934. "Any person" in that section means any person contemplated by the Act. The intention of the Legislature was to apply the provisions of the Act in cases where there was a compulsory liability to insure.

The scheme of the Act was not intended to apply to voluntary passengers.

It was the intention of the Legislature to assist hospitals in certain cases, where there was a compulsory liability to insure.

The right of a hospital to make such a claim as is made in the present case is statutory, such a right must be expressed in clear and precise language.

MacDermott, K.C. (in reply) :—

In *The Law of Motor Insurance*, by Shawcross, the corresponding section in the English Act is treated just as we ask the Court to treat this section in the Northern Ireland Act. The view there taken was that once a payment had been made and the authorised insurers knew that hospital treatment had been given, then liability arose.

There is a fundamental distinction between the statutory rights of third parties and the rights of a hospital.

Section 12 is absolutely general in its terms. The words used are clear and unambiguous, and no other words are required.

" A policy issued under this part of this Act " means a policy which complies with this part of this Act. The acid test is, has the insurance company made payment ?

A voluntary passenger is injured, and he is taken to hospital, the compensators are liable for hospital treatment.

We submit that the plaintiffs were entitled to recover and that the liability attached under the section.

The learned Recorder acted erroneously in coming to the conclusion that the plaintiffs were not entitled to recover.

Cur. adv. vult.

SIR WILLIAM MOORE, L.C.J.

Nov. 6.

MOORE, L.C.J. : In this case I am sorry to have arrived at a different conclusion to that of my colleagues.

The case is a short one but I feel that its true solution is well in the region of doubt. Personally, I decline to speculate as to what was the general intention of the Legislature in passing this piece of legislation except in so far as we can gather it from the actual words in the Statute itself, especially in sections 7 and 12 of the Act of 1930. I do not think that the amending

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Act of 1934, beyond increasing the amount which can be claimed, makes any difference deserving our attention.

As Lord Watson says in *Salomon v. Salomon & Co.* (1), "intention of the Legislature is a common but very "slippery phrase," and the assumption that a given result was necessary to, or resultant on, the intention of the Legislature very often begs the whole question in dispute.

The civil bill here claims monies alleged to be due to the plaintiffs by virtue of section 12 (1) of the Act of 1930. Prior to that Act the plaintiffs could not have recovered anything for such services, or else it would not have been necessary for Parliament to enact this section. Looking at the section itself, it will be noted that it throws the statutory liability for the first time on the insurer or insurers of a car to indemnify hospitals for their expenses of treatment of an insured person up to a sum of £25, now, under the Act of 1934, £50. This, as I have said, is a purely statutory liability; what does the statute mean?

I think in construing an Act creating for the first time such a liability we should interpret it very strictly and after the closest scrutiny, being particularly careful not to extend such a new responsibility farther than can be helped. What is the meaning of the words in section 12 (1), "the policy issued under this part of "this Act"? I think they can only refer to the policy mentioned in section 7, sub-section (1), passed contemporaneously of course with section 12, which sets out what matters are to be contained in a policy "in "order to comply with the requirements of this part "of the Act." As voluntary passengers are excepted, such a policy could not apply to them. Therefore I think such a policy is out of the scope of section 12 (1), and the statutory liability upon the insurers does not arise.

I think the following is a test question. Suppose the owner of the car had taken out a separate and distinct policy for passengers' risks in his car, covering persons such as Mr. Desmond Haldane, could anyone

(1) [1897] A.C. 22, 38.

describe such a policy as "a policy under Part II of "the Act"?

I cannot think that it makes any difference in law that such a cover as regards passengers' risks is to be found in a policy complying with the requirements of Part II of the Act so far as third party claims are provided against, instead of being a separate transaction.

For these reasons I think the learned Recorder was right in dismissing the civil bill, that in this case the plaintiffs' claim fails, and that the question in the case stated should be answered in the negative. [Unrevised.]

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ANDREWS, L.J.: The point involved in this case is a short one, but it is not wholly free from difficulty. Are the plaintiffs, who are a "Hospital" as defined by section 12 (2) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, entitled to recover from the defendant insurance company the expenses reasonably incurred by them in treating a patient who was injured by the negligence of the insured, in whose motor car he was travelling at the time of the accident as a voluntary passenger?

The liability of an insurance company to a hospital for the expenses of the treatment of a person injured in a motor car accident arises under section 12 of the Act of 1930, as amended, in regard to the maximum amount recoverable, by section 45 of the Act of 1934. Section 12 had no precedent in motor insurance legislation, conferring, as it does, a right against an insurance company upon a third party who is in no way privy to the insurance policy.

Before considering, however, the terms and provisions of that section in detail, it is necessary to consider the general scheme of the parts of the Acts of 1930 and 1934 which relate to compulsory insurance. Section 6 (1) of the Act of 1930 makes it unlawful to use a motor car on a public highway unless there is in force such a policy of insurance or security as complies with the requirements of Part II of the Act. By subsection (4) the section is made inapplicable to certain public bodies and also to any person who has made a deposit of £15,000 in the manner therein provided.

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Section 7, repealed and replaced by section 15 of the Act of 1934, deals with the requirements of Part II of the Act. This new section enacts that in order to comply with such requirements a policy of insurance must (*inter alia*) insure in respect of any liability which may be incurred by the insured in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor car on the public highway. There follows, however, a proviso to the section that such a policy shall not be required to cover liability to persons carried in a motor car except in the case of a motor car in which passengers are carried for hire or reward. In other words the Act does not require the policy to cover liability to voluntary passengers.

It will have been noticed that section 6 (1) of the Act of 1930 provides an alternative to a policy of insurance in what is called a security, and the requirements of such a security are prescribed by section 8 of the Act of 1930, now repealed and replaced by section 16 of the Act of 1934. Such security must be given by an authorised insurer or by a body of persons approved by the Ministry of Home Affairs as therein provided, and must consist of an undertaking to make good up to certain prescribed limits any failure by the owner of the motor car or other persons specified in the security duly to discharge any such liability as is required to be covered by a policy of insurance.

The sections to which I have referred help both to explain and to interpret the provisions of section 12 (1) of the Act of 1930. This section provides that where any payment is made by an authorised insurer under a policy issued under this Part of this Act, or by the owner of a motor car, in relation to the user of which a security under this Part of this Act is in force, or who has made a deposit under this Act, in respect of the death of or bodily injury to any person arising out of the use of a motor car on a public highway, and the person who has so died or been bodily injured has to the knowledge of the authorised insurer or such owner received treatment in a hospital in respect of the fatal or other bodily injury so arising, there shall also be

paid by the authorised insurer or such owner to such hospital the expenses reasonably incurred by the hospital in affording such treatment to an amount not exceeding £25 (amended by section 45 of the Act of 1934 to £50) for each person so treated.

This section contains several conditions precedent to the establishment of liability :—In its application to the present (a policy) case, it is necessary that (1) a payment should have been made by an authorised insurer ; (2) Such payment should have been made under a policy issued under this Part of the Act ; (3) The payment should have been in respect of the death of or bodily injury to any person arising out of the use of a motor car on a highway ; (4) The person who had so died or been injured should have received treatment in a hospital ; and (5) Such treatment should have been to the knowledge of the authorised insurer.

Now the case stated contains findings that all these conditions, with the possible exception of the second, have been fulfilled ; and the question which we have, accordingly, to determine is whether the payment was made under a policy issued under such Part (*i.e.*, Part II) of the Act. On the one hand, it is contended for the defendants that the payment could not be properly so described as it was made on foot of a liability in respect of which the Act imposed no obligation to insure. On the other hand, the plaintiffs submit that the condition is fulfilled if the policy was in fact "issued under the Act," even though the Act of Parliament did not require the liability in respect of which such payment was made to be covered by such policy. In other words that it is the *factum* of the issue of the policy rather than the nature of the liability which should be regarded.

After careful consideration I have come to the conclusion that the plaintiffs' contention is right. So far as the question is one of fact the policy was clearly "issued under Part II of the Act," as appears by the prescribed certificate of insurance which states that "the policy to which this certificate relates is issued "in accordance with the provisions of Part II of the "Road Traffic Act, 1930, and of the Motor Vehicles

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"and Road Traffic Act (Northern Ireland), 1930." Now, are we compelled either by the policy of the Act or otherwise to give a meaning to the words other than that which they naturally bear? It is admitted that to hold with the defendants we must read certain words into the section which are not expressly included in it. Mr. Fox contended for the defendants that the words "payment . . . under a policy issued under this "Part of this Act" should be read as "payment . . . "under a policy issued to comply with the require- "ments of this Part of this Act." I doubt if even such an interpretation would serve his purpose. In my opinion it would be necessary for him to add or substitute such words as would make the payment referable to a liability required to be covered by the Act. I see many objections to any such interpretation. The first, is the legal one referred to by Mr. MacDermott—that the introduction of such words is opposed to recognised canons of legal construction. The grammatical and ordinary sense of the words used should mainly be regarded. They should primarily be construed in their literal sense. These words, he submits, are in themselves precise and unambiguous, involving no contradiction, inconvenience, or absurdity; and, as the introduction of other words is unnecessary to give them a meaning, and, as such other words are not necessarily implied, they should not be introduced. The intention of the legislature, if the words be unambiguous, is to be found in the words themselves. If such intention is clear there is no necessity, nor, indeed, is there any right to look for it in other parts of the statute. These principles of construction are sound, and they are, in my opinion, applicable to the present case.

My next objection to the introduction of the words contended for by Mr. Fox is that they would produce a most anomalous result unless corresponding words were introduced to apply to the "security" and "deposit" alternatives referred to in the section. It is clear from section 15 (1) of the Act of 1930 that sums deposited under such security or deposit provisions may be resorted to for the discharge of other

liabilities, including, presumably, such a one as the present, after those "required to be covered" have been satisfied. Accordingly, unless some restricting or limiting words in reference to securities and deposits be also inserted in section 12 the absurdity would exist that in a case such as the present, where the owner had taken out a policy of insurance, a hospital could not recover, whereas it would be empowered to recover if he was protected by security or had made a deposit under the Act. If such anomaly were to be prevented, and repetition avoided, it would, indeed, be simplest and best to leave the early part of the section untouched, and to add after the words "public highway" the following words:—"being in any such case in "respect of a liability required to be covered by this "Part of this Act." But, whichever course be adopted, the conclusion is, in my opinion, irresistible that the introduction of any such words amounts to a redrafting of the section which is neither required nor justified. Our function is to interpret, not to legislate.

Other arguments compel the same view. Reference to sections 6, 7 and 15 of the Act of 1930, to the relevant amending sections, and also to sections 19 and 21 (1) and (2) of the Act of 1934 shows that, when the legislature so desired it, it had no difficulty in referring in appropriate language to the "requirements" of the Act, or to liabilities which "required to be covered." The express use of such words in certain sections appears to me to negative their implication in section 12. This argument is strengthened by reference to other sections, such as section 7 (1) (*a*) of the Act of 1930, and section 15 (7) (1) (*a*), section 15 (7) (3), and section 18 (1) of the Act of 1934 in which the "issuing" of a policy—the word used in section 12—is referred to in the ordinary acceptation of that term.

I am also influenced in arriving at my opinion by the deliberate use in the section of such wide terms as "any payment" and "any person." I find it impossible to give such words the restricted interpretation sought by the defendants to be placed upon them.

Finally, it seems to me that the conclusion contended for by the defendants could not be supported

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on grounds of principle or common sense. The necessity for section 12 admittedly arose from the difficulty experienced by hospitals in recovering the amount due to them in respect of the treatment which they rendered to persons who had been injured in motor car accidents. Such treatment confers immense blessing on the injured party, and at the same time reduces the financial liability of the insurance company. It was unjust that such services should be freely and generously rendered, and yet that the hospital should so often go without recompense. This was the disease which Parliament determined to cure, and for which it resolved a remedy in section 12.

It is clear from the time of Sir Edward Coke that it is not only our right but our duty to consider such matters, *Heydon's Case* (1). When enacting section 12 Parliament added to it a proviso to the effect that the section should not apply in any case where a charge has been made by the hospital in respect of such treatment. Thus Parliament declared that the hospital should be recouped its reasonable expenses by one or other of the two parties who had received benefit. Now can any logical reason be assigned why Parliament should limit this benefit, which was only justice to the hospital, to the case of the treatment of persons compulsorily insured, whilst in the case of persons such as Desmond Haldane, in which its services were equally valuable and the benefits conferred on both the injured man and the insurance company were equally great, it should be left without recompense or reward. I would not so hold unless compelled by plain and unambiguous language to do so. I shall certainly not read words into the section, which are not in it, in order to produce such an illogical result.

For these reasons the question submitted to us should, in my opinion, be answered in the affirmative.

In arriving at this conclusion I have refrained from referring to the corresponding provisions of the English Statutes, as such reference is sometimes dangerous where legislation is similar but not identical. I shall only say, however, that in my opinion there is

(1) 3 Co. Rep. 7a, 7b.

nothing in the wording of the corresponding section 33 of the Road and Rail Traffic Act, 1933, which affects the conclusion at which I have arrived.

BEST, L.J. : The question for decision is whether on the facts set out in the case stated the plaintiffs are entitled, in law, to recover from the defendants the sum sued for under section 12 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930.

The material parts of that section, as amended by section 45 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, are set out in clause 13 of the case stated and need not be repeated.

For the plaintiffs it was contended that, as the defendants are authorised insurers and had made a payment in respect of injuries to Mr. Haldane, by virtue of a policy issued under Part II of the Act of 1930, they were bound by the terms of section 12 (1) of the same Act to pay to the plaintiffs their expenses of treating him in the Royal Victoria Hospital, to which Mr. Haldane had been brought immediately after the occurrence of the accident which resulted in the said injuries.

For the defendants it was submitted that section 12 (1) binds the insurers to pay hospital expenses only in a case in which they have made a payment in respect of a liability which is required to be covered by the policy, and that as Mr. Carswell's liability to Mr. Haldane did not require to be covered by the policy, though in fact it was covered, the insurers are under no liability to make any payment to the plaintiffs.

The real question for decision is: What is the meaning of the words " a policy issued under this Part " of this Act " ?

Do they mean a policy which complies with the provisions of the Act irrespective of whether it contains more than is required by the Act, or do they mean a policy issued to cover only such liability as is required to be covered ?

The former is the construction which Mr. MacDermott says should be put upon the words, and Mr. Fox argues in favour of the latter construction.

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Section 7 (1) of the Act of 1930 provides that in order to comply with the requirements of Part II of the Act, the policy of insurance must be one which (*a*) is issued by a person who is an authorised insurer, and (*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor car on a public highway, but such a policy shall not be required to cover the liabilities specified in clauses (i), (ii) and (iii) of the proviso to this sub-section. There is, however, nothing to prevent an insured person from protecting himself in his policy against the various forms of liability specified in the proviso.

Section 15 of the Act of 1934 provides that the following section shall be substituted for section 7 of the Act of 1930 :—

"7.—(1) In order to comply with the requirements "of this Part of this Act a policy of insurance must "be a policy which (*a*) must be issued by a person "who is an authorised insurer, (*b*) must insure "certain persons or classes of persons therein "mentioned,"

and then two new clauses (*c*) and (*d*) are added. (1) (*a*) in the new section 7 is identical with (1) (*a*) in the original section 7 of the Act of 1930. (1) (*b*) in the new section adds to the classes of persons to be protected by insurance, the personal representatives of the insured, and apart from this change is substantially the same as (1) (*b*) in section 7 as it stood originally.

(1) (*d*) dealing with the period of cover and with the mode of its being terminated has no bearing on the question for decision in this case, but (1) (*c*) is, I think, of great importance in deciding whether the words "a policy issued under this Part of this Act" in section 12 (1) of the Act of 1930 should be construed as contended for by Mr. Fox.

Clause (1) (*c*) reads as follows :—"In order to comply "with the requirements of this Part of this Act a "policy of insurance must be a policy which is not "subject to any condition, restriction or limitation

"which is prescribed as a condition, restriction or "limitation, as the case may be, which shall not be "inserted in a policy issued for the purposes of this "Part of this Act."

This may, not inappropriately, I think, be regarded as a negative requirement of a policy of insurance issued under the Act, and any policy which contains the three positive provisions in (1) (*a*), (1) (*b*) and (1) (*d*) and does not contain or is not subject to any condition, restriction or limitation which is prescribed as a condition, restriction or limitation that shall not be inserted in a policy is a policy issued for the purposes of this Part of this Act.

The conditions, restrictions or limitations which must not be inserted in the policy are set out in section 20 of the Act of 1934. They have no relation to the insurance of a passenger who, like Mr. Haldane in the present case, is not carried for hire or reward.

In my opinion "a policy issued under this Part of "this Act" means a policy which satisfies the requirements of the Act, and it satisfies those requirements if it contains, on the one hand, such provisions as the Act specifies to be necessary, those, viz., which are set out in (1) (*a*), (1) (*b*) and (1) (*d*) of section 7, and, on the other hand, does not contain any condition, restriction or limitation which shall not be inserted in the policy.

Now in the Act of 1930, as amended by the Act of 1934, it is not a necessary requirement of a policy of insurance that liability to a passenger who is not carried for hire or reward should be guarded against; but provision or cover against such liability is not prohibited although it need not be inserted.

The clause 7 (1) (*c*) appears for the first time in the Act of 1934 and, so far as I have been able to examine them, I find no corresponding clause in the English Acts of 1930, 1933 and 1934 to which reference was made in the argument.

The construction sought to be put by Mr. Fox upon the words in section 12 (1) of the Act of 1930, "a policy "issued under this Part of this Act," is, in my opinion, unduly narrow, and I can find nothing in either Act which says or leads one to believe that if a prudent

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owner of a motor car takes out a policy complying with every requirement of the Acts, then that policy ceases to be "a policy issued under this Part of this "Act" merely because such prudent owner seeks protection from possible claims against which, whilst he is not bound, he is nevertheless not forbidden, to protect himself, and for which protection he is compelled by the insurer to pay an enhanced premium.

I think that the natural and ordinary meaning of the words of section 12 (1) is that if in fact a policy is issued which complies with the requirements of the Acts, and if under that policy a sum of money has in fact been paid by an authorised insurer in the circumstances set out in the section, the hospital is entitled to be paid for its services even though the policy contained more than the bare minimum requirements of section 7. To put any other construction on the section would defeat the intention of the Legislature, which I presume to have been that in case a person had taken out a policy under the Act and, pursuant to the provisions of that policy, a payment had been made by the authorised insurer to any person injured owing to the use of a motor car on a public highway, then if to the knowledge of the insurer the injured person had been treated in a hospital, that hospital should be entitled to payment for its services to the person who was injured. I think the Legislature intended and regarded it as reasonable that if the insurers should have to make a payment under the policy in respect of an accident the hospital which had treated the injured person should not be deprived of payment for their services to him.

Whilst the merits of the case cannot be appealed to in construing the section, I hope I may be allowed to say that there is absolutely no hardship whatever on the authorised insurer in having to pay for services rendered in a case of this kind. As has been already said, such insurer charges an enhanced premium for insuring passengers in a motor car who are not carried for hire or reward, and the prompt and skilful treatment given at hospitals to persons injured in motor accidents must in many instances save the insurers

large sums of money which otherwise they should have to pay.

It is impossible to estimate the advantage to the insurers of the services rendered by the hospitals in motor accident cases, and the charges which they are allowed to make are extremely moderate.

In my opinion the question put to us should be answered in the affirmative.

Solicitors for the plaintiffs : *C. & J. Black.*

Solicitors for the defendants : *C. & H. Jefferson.*

J. McC.

K.B.D. 1936.

Nov. 10.

ENNISKILLEN RURAL DISTRICT COUNCIL v. THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND (1).

Valuation Acts—Water Undertaking—Hereditaments in various Townlands—Directly and indirectly profitable Hereditaments—Receipts and Expenditure Basis—Present Replacement Cost Basis—Beneficial Occupation—Valuation (Ireland) Act, 1852 (15 & 16 Vic., c. 63) sections 11 and 12—Valuation Acts Amendment Act (Northern Ireland), (21 & 22 Geo. 5, c. 26) section 6.

A number of water undertakings had been constructed or acquired by the E. Rural District Council or their predecessors, and had been carried on under the provisions of the Public Health (Ireland) Acts. The Commissioner of Valuation had fixed a definite sum as the proper valuation of each of these various undertakings.

The Council appealed from the decision of the Commissioner of Valuation to the County Court Judge of F.

No water rate was struck and no water rents were charged to defray the annual expenditure, which was provided for out of the general rates levied for sanitary purposes. No separate accounts were kept for any of these undertakings, and no accounts were made up or produced showing expenditure and receipts for the undertakings either collectively or separately.

The Council were precluded from making a profit on the undertaking, and, in fact, made no profit.

As no accounts showing receipts and expenditure in respect of the undertakings were available the Commissioner had been unable in making the valuations, to follow the " receipts and expenditure " method and had based his valuation on an estimate of the present replacement cost of each undertaking. He then took two per cent. of this as representing the annual value of the undertaking as a whole and apportioned this between the various rating units in which the undertakings lay.

On behalf of the Commissioner of Valuation it was contended (*a*) that valuation did not depend upon pecuniary profit or upon whether or not the Council were at liberty to make a pecuniary profit; (*b*) that they could properly be regarded as hypothetical tenants; (*c*) that to them as such tenants the hereditaments with their substantial capital value and utility were worth a yearly rent and could not be valued at " Nil "; (*d*) that had a " receipts and expenditure " valuation been practicable the receipts from rates would naturally have exceeded the expenditure as loan charges which were not a tenant's obligation could not be regarded as expenditure.

(1) In the King's Bench Division, before Moore, L.C.J., and Brown, J.

The County Court Judge decided that the Council did not in fact and being a Sanitary Authority could not legally make any profit out of the undertakings and that since the decision of the House of Lords in the *Port of London Authority v. The Assessment Committee of Orsett Union* [1920] A.C. 273, the decisions in *Corporation of Worcester v. Droitwich Assessment Committee*, 2 Ex. D. 49, and *Mayor of Peterborough v. Stamford Union*, 31 W.R. 949, which, in his opinion ruled the case, must be regarded as good law.

He ordered that the valuations should all be reduced to Nil, but stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division, (Moore, L.C.J., and Brown, J.), that the County Court Judge was wrong in marking the valuation as nil, and that it should have been valued at the agreed figures, as the occupation was of value, even though non-producing.

CASE STATED under The Annual Revision of Rateable Property (Ireland) Amendment Act, 1860 (23 Vict., c. 4) section 10, by the County Court Judge and Chairman of Quarter Sessions for County Fermanagh, on the application of the Commissioner of Valuation for Northern Ireland, as follows :—

This case relates to eleven appeals by the Rural District Council of Enniskillen (hereinafter called the appellants) against a like number of entries made in the valuation lists in respect of certain hereditaments constituting :—

(*a*) The Derrygonnelly Water Undertaking which supplies water to the village of Derrygonnelly in the County of Fermanagh.

(*b*) The Belcoo Water Undertaking which supplies water to the Village of Belcoo in the said County.

(*c*) The Tempo Water Undertaking which supplies water to the Village of Tempo in the said County, and

(*d*) The Lisbellaw Water Undertaking which supplies water to the Village of Lisbellaw in the said County.

The eleven appeals were all heard together before me at Enniskillen, on the 20th day of February, 1936. I reserved my decision which I delivered at Enniskillen on the 29th day of April, 1936.

The following are particulars of the entries relating to the Derrygonnelly Water Undertaking which are affected by this appeal :—

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Description.	*Townland.*	*Valuation.*
Water Mains	Dromore	£12
Water Mains	Drumary	£5
Water Mains	Sandhill	£9
Water Mains	Stratonagher	£4
Water Mains	Derrygonnelly	£3
Water Mains	Monawilkin	£3

This undertaking was constructed about the year 1930 at a cost of £3,750. It consists of a steel conduit of 3-inch, 4-inch, and 5-inch diameter supplied by Doagh Lough. A few houses in Derrygonnelly and district have water laid on from this supply which also feeds a number of street pumps.

The following are particulars of the entries relating to the Belcoo Water Undertaking which are affected by this appeal :—

Description.	*Townland.*	*Valuation.*
Water Mains	Aughrim	£2
Water Mains	Belcoo East	£9
Water Mains	Carrickadranton	£2

This undertaking was constructed between the years 1930 and 1932 at a cost of abour £1,000. It consists of a small covered concrete tank with a capacity of 1,300 gallons, fed by springs, and a 4-inch diameter steel water main. A few houses in the district have water laid on and the supply also feeds several street pumps.

The following are particulars of the entries relating to the Tempo Water Undertaking which are affected by this appeal :—

Description.	*Townland.*	*Valuation.*
Reservoirs and Water Mains	Edenmore	£30

This Undertaking was constructed since 1928 at a cost of £2,000. It consists of two reservoirs fed by springs with asbestos cement and cast iron water mains. One reservoir is constructed of concrete, covered, and rectangular in shape, with an approximate capacity of 240,000 gallons. The other reservoir is constructed of concrete, covered and circular in shape. It has a capacity of approximately 27,000 gallons. The mains are 2 inches, 3 inches and 4 inches in diameter. A few

houses in Tempo and district have water laid on and the supply feeds a number of street pumps.

The following are particulars of the entries relating to the Lisbellaw Water Undertaking which are affected by this appeal :—

Description.	*Townland.*	*Valuation.*
Reservoirs and Water Mains	Mullybritt	£28

This undertaking has been in existence for over 40 years. It consists of an open stone-pitched reservoir, served by springs, and cast iron water mains. The reservoir has a capacity of approximately 2,000,000 gallons. No evidence is available as to the actual cost of construction. A few houses in Lisbellaw and district have water laid on and the supply feeds a number of street pumps. Mr. Townsend, C.E., proved to my satisfaction that the reservoir is very defective and only holds one quarter of its capacity and that the pipes are defective and filled with rust and deposit ; that the undertaking is practically useless and can only give a part supply. Mr. Townsend said that it is out of date and that plans are being prepared for a new scheme and that when the new scheme is put in the existing plant will be completely scrapped.

All the above water undertakings were constructed or acquired by the appellants or their predecessors and are carried on by the appellants as the Local Sanitary Authority under the provisions of the Public Health (Ireland) Acts.

The annual expenditure borne by the appellants in connection with the said undertakings consists of the costs and expenses of maintenance and working and the yearly payments made in respect of the loan charges by which the capital expenditure and interest thereon are met. No water rate is struck and no water rents are charged to defray this annual expenditure which is provided for out of the general rates levied for sanitary purposes. The appellants did not keep separate accounts for any of the said undertakings and no accounts were made up or produced showing expenditure and receipts for the undertakings either collectively or separately.

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The appellants did not contend that the said undertakings should be distinguished in the valuation lists as exempt from rating; but they did contend that the valuations appealed against should be reduced in each case to "Nil" on the grounds:—

(*a*) that they were precluded from making a profit on the undertaking;
(*b*) that they made no profit on the undertaking;
(*c*) that they did not make any rate or charge in respect of the undertaking;
(*d*) that the amount of rates applied to the service of the undertakings did not exceed the annual expenditure above referred to;
(*e*) that in consequence the appellants did not, in fact, make or derive any pecuniary profit from any of the undertakings.

In support of these contentions reliance was placed upon the decisions in *Corporation of Worcester v. Droitwich Assessment Committee* (1), and *Mayor of Peterborough v. Stamford Union* (2).

For the Commissioner evidence was given by Mr. J. S. Pridmore, Chartered Surveyor. This witness stated that as no accounts showing receipts and expenditure in respect of the undertakings were available or obtainable he had been unable, in making the valuations, to follow the "receipts and expenditure" method referred to in *Kingston Union v. Metropolitan Water Board* (3). In these circumstances he based his valuation on an estimate of the present replacement cost of each undertaking. He then took two per cent. of this as representing the annual value of the undertaking as a whole and proceeded to apportion this between the various rating units in which the undertaking lay. In the opinion of this witness the figure of two per cent. was a fair one to apply and one which resulted in valuations comparable to and uniform with those of similar undertakings. It represented the proportion which, in his experience, the valuations of undertakings valued by the "receipts and expenditure" method bore, on an average, to the estimated replacement cost of such undertakings.

(1) 2 Ex.D. 49.
(2) 31 W.R. 949.
(3) [1926] A.C. 331.

On behalf of the Commissioner it was contended (*a*) that valuation did not depend upon pecuniary profit or upon whether or not the appellants were at liberty to make a pecuniary profit ; that the appellants could properly be regarded as hypothetical tenants ; (*b*) that to them as such tenants the hereditaments with their substantial capital value and utility were worth a yearly rent and could not be valued at "Nil" ; (*c*) that had a "receipts and expenditure" valuation been practicable the receipts from rates would necessarily have exceeded the expenditure inasmuch as loan charges, which were not a tenant's obligation, could not be regarded as expenditure ; (*d*) and that the decisions relied upon by the appellants were not in point, or if in point, could not now be regarded as good law. In support of these contentions reference was made to *London County Council v. Erith and Westham Parishes* (1), and *Kingston Union v. Metropolitan Water Board* (2). The County Court Judge asked if there was any evidence of any body who would give more than the cost of the loan and maintenance or evidence which would show a beneficial interest over and above what it costs the appellants. No such evidence was put before him.

The net point raised for determination was whether in law the valuations appealed against should be reduced to "Nil" having regard to the facts and circumstances above set forth. It was agreed that if the valuations were not to be so reduced to "nil" they were not unreasonable and should all stand save the item of £28 placed upon the reservoir and water mains in the townland of Mullybritt referred to above. This it was agreed should (if not reduced to "Nil") be fixed at £20.

The County Court Judge came to the conclusion that the appellants did not in fact and being a Sanitary Authority could not legally make any profit out of the undertakings and that since the decision of the House of Lords in the *Port of London Authority v. The Assessment Committee of Orsett Union* (3), the decisions in the

(1) [1893] A.C. 562.
(2) [1926] A.C. 331.
(3) [1920] A.C. 273.

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Droitwich case (1) and the Peterborough case (2) relied on by the appellants which, in his opinion, ruled this case must be regarded as good law. He held with the appellants and accordingly ordered that the valuations appealed against should all be reduced to "Nil" and that the valuation lists should be amended accordingly.

The question for the Court is—Was the County Court Judge right in law in so holding?

If this question is answered in the negative the valuations appealed against are to be confirmed with the modification mentioned above.

MacDermott, K.C. and *Miller* for the Commissioner of Valuation for Northern Ireland:—

The whole question is, whether the occupation is of value to the Council or not. We submit that valuation does not depend on making a pecuniary profit.

We rely on *The Queen v. School Board for London* (3), where it was held that in assessing to the poor-rate schools occupied by a School Board, which can make no profit in a commercial sense as tenant of the schools, the School Board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the Board might reasonably be expected to pay for the premises for use as schools.

In his judgment, Lord Esher, M.R., said: "The "directions given by the Act are equivalent to saying "that one must look at all possible tenants, and the "phraseology does not exclude an owner who himself "occupies the premises. Therefore an owner in "occupation of the premises is not excluded from con-"sideration as a possible tenant." To the same effect are the words used by Fry, L.J., at page 742.

That case was followed in *London County Council v. Churchwardens of Parish of Erith and Assessment Committee of Dartford Union* (4).

This last case decided that where a local authority has a statutory duty to perform, it is to be considered

(1) 2 Ex.D. 49.
(2) 31 W.R. 949
(3) 17 Q.B.D. 738, 740, 742.
(4) [1893] A.C. 562.

as a hypothetical tenant for the purpose of determining the rateable value of the premises which it owns and occupies.

In the present case the Council is able to do for itself what otherwise it would have to pay for.

The principle laid down in the Erith Case (1), that valuation does not depend upon pecuniary profit has never been questioned and has been followed in *Port of London Authority v. Assessment Committee of Orsett Union* (2). We rely on the words used by Lord Birkenhead, L.C., in this last case at p. 284, when, as he said, he re-stated certain principles of law.

[They also referred to *St. James's and Pall Mall Electric Light Co. v. Westminster Assessment Committee* (3).]

Murphy, K.C. and *W. Johnson* for the Enniskillen Rural District Council :—

We submit that in the present case, considering the section and the decided cases, the value is nil. What has to be found is not value in any popular sense, it is the rent which, taking one year with another, would be paid.

We rely on *Corporation of Worcester v. Droitwich Assessment Committee* (4), where it was held that where land is used for a public purpose, and the occupiers thereof are prevented by statute from deriving the full pecuniary benefit which it is capable of producing, the land is to be rated to the poor with reference to the amount of profit actually made, and not with reference to the amount which might be earned by the occupiers if they were not subject to restrictions.

In the present case no receipts are got directly from these water undertakings. As no profit is being made, there can be no net annual value.

Mayor of Peterborough v. Stamford Union (5) very much resembles the present case. That case was affirmed in the Court of Appeal and recognised as

(1) [1893] A.C. 562.
(2) [1920] A.C. 273, 284.
(3) [1934] A.C. 33.
(4) 2 Ex.D. 49.
(5) 31 W.R. 949.

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binding in *Metropolitan Water Board v. Kingston Union* (1). Bankes, L.J., said at p. 561, "I cannot "distinguish the Peterborough Case (2) from the "present one, and I do not think that this Court is "entitled to differ from this decision, even if it desired "to do so, unless it can find that the decision has been "reversed or disapproved of in some authoritative "manner." He then proceeded to show that such is not the case.

The St. James's Case (3) is quite different from the present case. In the Erith case (4), Lord Herschell said at page 592, that he did not think that the class of cases such as gasworks, waterworks, and other industrial undertakings affords any guide to the assessments of hereditaments generally.

The principle laid down in the Erith case (4) has no bearing on the present case. The principle laid down in the *Mayor of Peterborough v. Stamford Union* (2) should be applied to the present case and the valuation should be held to be nil.

The statement in *Ryde on Rating* (6th ed.), page 384, is a clear admission that the proper method of assessment of undertakings such as those in the present case is on the basis of the profits actually earned. The decision of the House of Lords in *Metropolitan Water Board v. Kingston Union* (5) is referred to in *Ryde on Rating* as an authority for that principle.

We suggest that there is nothing in the authorities which qualifies in any way the express approval of the Peterborough case (2) in the speech of Lord Cave in the Kingston case (5).

The Mayor of Peterborough v. Stamford Union (2) has been considered by a great number of judges and has been expressly approved by Lord Cave, L.C., in *Kingston Union v. Metropolitan Water Board* (5).

MacDermott, K.C. (in reply):—

If the arguments used on behalf of the Enniskillen Rural District Council were to be accepted there

(1) [1925] 2 K.B. 509, 560, 561.
(2) 31 W.R. 949.
(3) [1934] A.C. 33.
(4) [1893] A.C. 562, 592.
(5) [1926] A.C. 331, 342-344.

would be a revolution in the valuations of water authorities.

In the Droitwich case (1) it was decided that the land was to be rated with reference to the amount of profits actually made, and not with reference to the amount which might be earned by the occupiers if they were not subject to restrictions.

Lord Cave, L.C., did not expressly approve of the decision in the *Mayor of Peterborough v. Stamford Union* (2).

Lord Hewart, C.J., in his judgment in *Metropolitan Water Board v. Kingston Union* (3) dealing with *Peterborough Corporation v. Stamford Union* (2), said, "There "the judgments are to be read in close connection with "the particular facts and the particular issues raised." In his judgment in the Court of Appeal in *Metropolitan Water Board v. Kingston Union Assessment Committee* (3), Atkin, L.J., referring to *Peterborough Corporation v. Stamford Union* (2), said, "the decision loses much of "its value for present purposes."

Peterborough Corporation v. Stamford Union (2) has not been spoken of with unqualified approval by any judge.

We submit that that decision cannot stand. The proposition for which we contend has been the law since 1893. That proposition is that all that is necessary is that the occupation should be of value.

The form in which the Enniskillen Rural District Council keep their accounts makes it impossible to adopt the profits basis. It is quite clear that although there is no profit there is clear proof that the occupation is of value and on the authority of *London County Council v. Churchwardens of Parish of Erith and Assessment Committee of Dartford Union* (4), liability attaches in the present case.

MOORE, L.C.J.: We have considered this case and do not think it necessary to reserve judgment.

SIR WILLIAM MOORE, L.C.J.

(1) 2 Ex.D. 49.
(2) 31 W.R. 949, 950.
(3) [1925] 2 K.B. 509, at page 526.
(4) 1893 A.C. 562.

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SIR WILLIAM MOORE, L.C.J.

The learned County Court Judge has marked the valuation as "nil." We have to consider whether he was correct in so doing.

We do not see our way to follow the conclusion arrived at in the case of *The Mayor of Peterborough v. Stamford Union* (1) that there can be no rating unless there are profits. This case appears to stand by itself. By statute all Public Boards that supply water in a public capacity are prohibited from making any profit, that being so, it had been argued they would always escape valuation. It seems a very remarkable conclusion that such should be the law, we do not think it is the law.

We must consider the words used by Lord Birkenhead, L.C., in his speech in the House of Lords, in *Port of London Authority v. Assessment Committee of Orsett Union* (2), where he said, "the question of rateability "does not depend on whether the occupier does, or "can, make a profit by the use to which he puts the "hereditament; it depends on whether the occupation "is of value."

There can be no doubt, quite independent of whether a profit is made, that the use of these waterworks and the mains and everything connected with them constitutes a very valuable asset to the Enniskillen Rural District Council, even though such asset is non-producing. The occupation is useful to the Council and to the whole community. We think such occupation is of value and, therefore, ought to be valued and rated accordingly.

In the case of the *Kingston Union v. Metropolitan Water Board* (3), Viscount Cave, L.C., pointed out that in *Mersey Docks v. Cameron* (4), it was established that property is not exempt from rateability merely because it is occupied for public objects and without the possibility of commercial profit.

We think that the learned County Court Judge was wrong in marking this valuation as "nil." It should be valued at the agreed figures.

(1) 31 W.R. 949.
(2) [1920] A.C. 273, 284.
(3) [1926] A.C. 331.
(4) [1865] 11 H.L.C. 443

The question put to us by the County Court Judge will be answered in the negative. [Unrevised.]

BROWN, J.: I have nothing to add.

Solicitors for Enniskillen Rural District Council: *Maguire & Herbert.*

Solicitor for the Commissioner of Valuation for Northern Ireland: *F. C. MacNeice.*

J. McC.

Land Purchase Commission. 1928.

March 6.

ESTATE OF MARION CAROLINE DEHRA CHICHESTER-CLARK (1).

Mines and Minerals—Reservation of—Kieselguhr—Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *section* 13 (3) (*c*), *section* 99—*Northern Ireland Land Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 34), *section* 16 (1), (2) —*Whether Kieselguhr a mineral or a clay.*

The owner of the C.-C. Estate applied to the Land Purchase Commission, under section 16 of the Northern Ireland Land Act, 1925, for an order that the mineral rights on the holdings comprised in Provisional List No. 623, and especially the right to the substance known as Kieselguhr, should be excepted on the vesting of the holdings in the Commission and should not be affected by such vesting.

Upon this estate there were very substantial deposits of the mineral clay known as Kieselguhr, or Diatomite, and the object of the application was to secure to the owner these very valuable deposits. The greater part of the settled estates which adjoined these holdings had been previously sold through the Land Commission, and on such sale the mineral rights on the holdings were reserved to the owner.

Kieselguhr was being mined on adjoining lands forming part of the same estate by a Company under a sub-lease from the owner's predecessor in title. A minimum rent of £200 was being paid under the sub-lease for the right to mine Kieselguhr on 67 acres 3 roods 16 perches. This working or developing was upon holdings let on fee farm grants and therefore excluded from the Northern Ireland Land Act, 1925, but it was upon the same estate. The whole estate had been settled or enjoyed as one property. Kieselguhr had therefore been worked or developed by the owner at the time of sale.

The proper name of Kieselguhr is Diatomite and it is classed as a mineral in standard works on geology. Expert evidence was given on behalf of the owner that it is formed by accumulation of the outer hard parts of uni-cellular plants which are secreted as a protective covering. Evidence was also given that it was altogether different from clay, having important uses in various industries such as an absorbent of nitro-glycerine, in polishing powders, in the manufacture of water glass, in abrasive soaps, in lagging steam pipes, as packing in refrigerators, as an absorbent for liquid manures for fertilisers, and as discs for gramophone records.

Held, by Megaw, K.C., Judicial Commissioner, that Kieselguhr is a mineral within section 13 of the Irish Land Act, 1903, and that the rights to it, possessing a substantial value, and there being a reasonable prospect of them being worked, should be reserved to the owner on the vesting of the holdings in the Land Commission.

(1) In the Court of the Land Purchase Commission before the Land Purchase Commissioners.

Land Purchase Commission. 1928.

Estate of Marion Caroline Dehra Chichester-Clark.

Application to the Land Purchase Commission by the owner of the Chichester-Clark Estate for an order under section 16 of the Northern Ireland Land Act, 1925, that the mineral rights on the holdings comprised in Provisional List No. 623 and especially the right to the substance known as Kieselguhr should be excepted on the vesting of the holdings in the Land Purchase Commission and should not be affected by such vesting.

Under the more common name of Kieselguhr a considerable deposit of diatom earth, originally formed at the bottom of lakes and other stretches of water from the remains of small marine plants, has been excavated at various times by companies operating in the alluvial flats of the Bann valley. The material is easily dug from beneath a thin surface soil, and the brick-shaped blocks are subjected to a drying process.

Upon this estate there were very valuable deposits of Kieselguhr and the object of the application was to secure them to the owner as being of very great value.

The greater part of the settled estates which adjoined these holdings had been previously sold through the Land Commission, and on such sale the mineral rights on the holdings then sold were reserved to the owner.

There was a further portion of the settled estates which, being let to tenants under fee farm grants or perpetuity leases could not be included in the sale.

Kieselguhr was being mined on these adjoining lands forming part of the Chichester-Clark Estate by the United Kingdom Peat Moss Litter Company, under a sub-lease from the predecessor in title of the owner of the estate. Under this sub-lease a minimum rent of £200 was paid for the right to mine this Kieselguhr on 67 acres 3 roods 16 perches, being part of the lands of Creagh.

Kieselguhr was thus being worked or developed by the owner at the time of sale. This working or developing was on holdings let on fee farm grants and therefore excluded from the Northern Ireland Land Act, 1925. This working was going on on the same estate, the whole having been settled and enjoyed as one property.

Land Purchase Commission. 1928.

ESTATE OF MARION CAROLINE DEHRA CHICHESTER-CLARK.

Section 16 (1) of the Northern Ireland Land Act, 1925, provides that any rights to mines or minerals on or under a holding which on a sale by agreement under the Land Purchase Acts would be reserved to the Commission pursuant to section 13 of the Act of 1903, shall, subject to section 99 of that Act, and save as thereinafter provided, vest in the Commission on the vesting of the holding in them by virtue of the Act of 1925.

The next sub-section provides that on being satisfied that such rights possess a substantial value and that there is a reasonable probability of the minerals being worked within twenty years, the Commission may make an order that such rights shall be excepted on the vesting of the holding in the Commission.

The Judicial Commissioner had expressed himself satisfied as to these points arising under section 16 of the Act of 1925. The only point left to be decided was as to the construction of section 13 of the Irish Land Act, 1903, which, after providing that the exclusive right of mining and taking minerals, and digging and searching for minerals, should be reserved to the Commission, added the words " Provided that " this section shall not apply to any stone, gravel, " sand or clay."

Henry J. Seymour, Professor of Geology and Chemistry, at University College, Dublin, stated in evidence that the proper name of Kieselguhr was diatomite, it is classed as a mineral in standard works on geology. It is formed by accumulation of the outer hard parts of uni-cellular plants, which are secreted as a protective covering. It is insoluble, and the particles of it are microscopic in size. Dry diatomite weighs 14 lbs. to the cubic foot, ordinary clay not less than 70 and up to 100 lbs. per cubic foot. Its formation is different and its chemical composition is different from clay, and it has a different weight per cubic foot. It is altogether different from clay. Clay is an integral part of the soil, diatomite is not.

Diatomite is used for various purposes, such as (*a*) an absorbent of nitro-glycerine, (*b*) in polishing powders, (*c*) in the manufacture of water glass, (*d*) in

abrasive soaps, (*e*) in lagging steam pipes, (*f*) as an absorbent for liquid manures for fertilizers, (*g*) in discs for gramophone records.

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Monroe, K.C. (with him *J. Gerald Dougherty*) for the owner :—

The application is confined to Kieselguhr and notice has been served on all parties concerned, on the tenants named in the provisional list with the exception of two on whose holdings there is no Kieselguhr.

We submit that we have proved that Kieselguhr is a mineral and we rely on *Great Western Railway v. Carpalla United China Clay Company* (1), where it was held that china clay underlying land in Cornwall purchased by a railway company for the purposes of its undertaking, and occupying a small fraction of the subsoil, is a " mineral," within the meaning of section 77 of the Railway Clauses Consolidation Act, 1845, and excepted from the lands conveyed to the railway company.

The Solicitor for the Treasury, Mr. J. H. B. Gunning, was in attendance and expressed the view that Kieselguhr is a mineral.

There was no appearance for the tenants, and there was no one before the Court whose interest it was to argue that Kieselguhr was a clay.

MEGAW, J.

MEGAW, K.C. (Judicial Commissioner) : The Court being of opinion that the question at issue is governed by *Great Western Railway v. Carpalla United China Clay Company* (1), hold that Kieselguhr is a mineral and not a clay, on the evidence before us we hold that it should be reserved.

The Court made the following order : " The Court " being of the opinion that the rights to Kieselguhr " possess a substantial value and that there is a " reasonable prospect of them being worked, directs " that Kieselguhr be excepted on the vesting of the " holdings in the Land Commission."

(1) [1909] 1 Ch. 218 ;
[1910] A.C. 83.

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The order of the Commission was to affect only the holdings of those tenants who had been served with the notice of motion by the owner.

ESTATE OF MARION CAROLINE DEHRA CHICHESTER-CLARK.

Solicitors for the owner: *Martin, King, French and Ingram.*

Solicitor for the Treasury: *J. H. B. Gunning.*

J. McC.

MEGAW, J.

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Ch.D. 1936.

June 24, 25, 26, 29. July 7.

C.A.

Nov. 2, 4. 5, 1937.

Feb. 18.

Electricity—Supply—Wayleave—Power to place Electric Lines across Land—Consent of Ministry of Commerce—"Terms, conditions and stipulations"—"Pecuniary Terms"—Amending Statute—Whether Ultra Vires—Whether Statute to take away property without Compensation—Functions and Jurisdiction of the Ministry of Commerce—Electric Lighting Act, 1882 (45 & 46 *Vict., c.* 56), *section* 17—*Acquisition of Land* (*Assessment of Compensation*) *Act*, 1919 (9 & 10 *Geo.* 5, *c.* 57), *sections* 1, 12 (2) —*Electricity* (*Supply*) *Act*, 1919 (9 & 10 *Geo.* 5, *c.* 100), *sections* 22 (1), 39, 40 (2)—*Electricity* (*Supply*) *Act* (*Northern Ireland*), 1931 (21 & 22 *Geo.* 5, *c.* 9), *sections* 19, 37 (2), 37 (8)—*Electricity* (*Supply*) *Act* (*Northern Ireland*), 1933 (23 & 24 *Geo.* 5, *c.* 33), *section* 5.

Under the Electricity (Supply) Act (Northern Ireland), 1931, the defendants were constituted a Board for the purpose of co-ordinating and improving the supply and distribution of electricity in Northern Ireland.

By section 19 of that Act the Board is given power to acquire lands or easements essential for their purpose in the same manner as a local authority has power to do under the Electricity (Supply) Acts, 1882 to 1919, for the purpose of a generating station, and the Board is deemed to be a public authority for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919.

By section 17 of the Electric Lighting Act, 1882, the undertakers shall, in exercise of their powers, cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them, the amount of such compensation in case of difference to be determined by arbitration.

Section 5 (1) of the Government of Ireland Act, 1920, provides that the Parliament of Northern Ireland shall not make a law so as directly or indirectly to take any property without compensation. It further provides that any law made in contravention of the restrictions imposed by that sub-section shall, so far as it contravenes those restrictions, be void.

Section 37 (8) of the Act of 1931 as amended by section 5 of the Electricity (Supply) Act (Northern Ireland), 1933, provides that

(1) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.JJ.

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where under this section the consent of the Ministry of Commerce is required to the placing or retention of an electric line across any land, the said Ministry may, if, after giving to all parties concerned an opportunity of being heard and the said Ministry thinks just, give its consent either unconditionally or on such pecuniary or other terms and subject to such conditions and stipulations as it thinks just, and the said Ministry in deciding whether to give or withhold its consent, or to impose any terms, conditions or stipulations, shall among other considerations, have regard to the effect (if any) on the amenities or value of the land of the placing of the line in the position and manner proposed.

Held (affirming the decision of Megaw, J., in the Chancery Division), that though the consent in the form given was subject to conditions which the Ministry acted irregularly in imposing, these did not invalidate that consent, and that the said section 37 (8), as amended, is *intra vires* the Parliament of Northern Ireland, that it had not the effect of impliedly repealing section 17 of the Act of 1882, and, accordingly, that when the Ministry of Commerce gives its consent under the said section 37 (8) as amended, and imposes terms whether pecuniary or otherwise, it is not competent for it to usurp the functions of an arbitrator under section 17 of the Act of 1882.

APPEAL by the plaintiff from an order of Megaw, J., dated 7th July, 1936, dismissing the plaintiff's action, which was brought to obtain an injunction and damages in respect of the alleged wrongful entry by the defendants upon the plaintiff's lands and the erection of a pole thereon.

The facts and relevant statutes are fully set out in the judgment of Megaw, J.

McGonigal, K.C., *Porter, K.C.*, and *Curran* for the appellant :—

Section 5 of the Government of Ireland Act, 1920, forbids legislation to take land without the payment of compensation. Section 37 (8) of the Electricity (Supply) Act (Northern Ireland), 1931, as amended by section 5 of the Electricity (Supply) Act (Northern Ireland), 1933, in purporting to give the defendants a right to take land unconditionally (i.e., without compensation) is *ultra vires* the Parliament of Northern Ireland and the consent given by the Ministry of Commerce under the said sections is *ultra vires* and null and void. In *West Midlands Joint Electricity Authority*

v. Pitt (1), it was held that the "terms, conditions and "stipulations," which the Minister of Transport may attach to his consent under section 22 (1) of the Electricity (Supply) Act, 1919, which corresponds to section 37 (8) of the Act of 1931, did not include pecuniary terms. Macnaghten, J., in his judgment in that case, said at page 24: "It would have been so "simple to have said that the Minister might give "his consent subject to such pecuniary or other terms "as he might think just." This decision led to the passing of section 5 of the Act of 1933, which is an attempt to empower the Ministry to embody pecuniary terms in its consent and accordingly usurp the functions of an arbitrator under section 17 of the Act of 1882 and is *ultra vires* the Parliament of Northern Ireland.

The Ministry of Commerce in giving its consent has purported to deal, and has dealt, with compensation as a whole. The compensation given relates not only to wayleave but purports also to be given in respect of damage to the amenities and value of the land.

Even assuming that the said section 37 (8) as amended to be valid the Ministry of Commerce has given its consent to the defendants placing an electric line across plaintiff's land without making provision in the said consent for compensation to be paid by the defendants to the plaintiff for damages sustained by him by reason of the placing of the said line across plaintiff's land contrary to section 17 of the Electric Lighting Act, 1882, and to section 5 of the Government of Ireland Act, 1920, and the said consent is in consequence null and void.

Before giving its consent the Ministry failed to comply with the provisions of section 37 of the Act of 1931 in that (1) it failed to have regard to the effect on the amenities or value of the plaintiffs' land of the placing of the said electric line in the position and manner proposed; (2) the said consent wrongfully imposes on the plaintiff terms and conditions, which are in contravention of the provisions of the Act of 1931.

(1) [1932] 2 K.B. 1.

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The consent cannot be taken *simpliciter*. It is a consent given *sub modo* and subject to terms and conditions.

Murphy, K.C., *MacDermott*, K.C., and *Chambers* for the respondents :—

The terms of section 37 (8) of the Electricity (Supply) Act (Northern Ireland), 1931, recognises a distinction between the effect on amenities and effect on the value of the land. The compensation embodied in the consent was limited to a payment for wayleave. The plaintiff still retains the right to compensation under the Electricity (Supply) Act, 1919, or under section 17 of the Electric Lighting Act, 1882, which provide for compensation in general terms and are unrepealed and unaffected by the terms of this consent.

In *West Midlands Joint Electricity Authority v. Pitt* (1), which was a claim to set aside consents given by the Minister of Transport under section 22 (1) of the Electricity (Supply) Act, 1919, which corresponds to section 37 (8) of the Act of 1931, the consents were held to be good. That case is an authority for the proposition that the introduction into a consent of this character of any terms held to be invalid does not make that consent void ; but that the invalid terms may be disregarded by the Court.

The placing of a pole on the plaintiff's land without payment of compensation for the taking of land is not contrary to section 5 of the Government of Ireland Act of 1920. In *Escott v. Newport Corporation* (2), it was held that the placing of a pole in the pavement of a public street was not a taking of any of the land of the person in whom the ownership of the land was vested.

The consent in this case is valid. There has been no motion to have the consent set aside.

Assuming section 37 (8) of the Act of 1931 as amended to be void *in toto* the Ministry would still have power to give its consent to the placing of the line across the plaintiff's land. Both parties have resorted to a statutory tribunal and are bound by its consent.

(1) [1932] 2 K.B. 1. (2) [1904] 2 K.B. 369.

If a condition in the consent is a nullity that condition is severable. In contract there may be the severance of even illegal conditions. *Pickering v. Ilfracombe Railway Co.* (1).

McGonigal, K.C. (in reply) :—

Compensation payable under the Act of 1931 as amended is not limited to payment in respect of wayleave rentals. Its terms are general in their application.

An unconditional consent is a denial of compensation and contrary to section 5 of the Government of Ireland Act, 1920.

MEGAW, J. MEGAW, J. : This action was brought by Dr. Alfred A. Robb against the defendants the Electricity Board for Northern Ireland for (1) an injunction restraining the defendants, their servants, agents and contractors from entering or continuing to enter upon the lands of the plaintiff, situate at Lisnabreeny, Castlereagh, Co. Down ; (2) An injunction restraining the defendants, their servants, agents and contractors from erecting or continuing to erect upon the said lands or any part thereof any pole or poles or their equivalents, stanchions, works, structures or erections of any kind or description and from laying or suspending across the said lands or any part thereof any electric line or lines.

Under the Electricity (Supply) Act (Northern Ireland), 1931, the defendants were constituted a Board for the purpose of co-ordinating and improving the supply and distribution of electricity in Northern Ireland, and for that purpose to prepare and carry out development schemes in development areas.

By section 19 of that Act the Board is given power to acquire lands or easements essential for their purpose in same manner as a local authority has power to do under Electricity (Supply) Acts, 1882 to 1919, for the purpose of a generating station, and the Board is deemed to be a public authority for purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919.

(1) L.R. 3 C.P. 250.

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Then by section 37, Electricity (Supply) Act (Northern Ireland), 1931, the Electricity Supply Acts are amended in certain respects. This section repeals section 22 of the Act of 1919 and replaces it.

By that section the Board—which by section 7 (1) have become the authorised undertakers of the area coming under he purview of the Court in this action—have been given wide statutory powers as to placing electric lines above or under the ground across any land, and the provisions subject to which they may exercise these powers are stated.

By sub-section 2 the powers of authorised undertakers under this section shall be exercised in accordance with the following provisions :—

(*a*) Before placing an electric line across any land the undertakers shall serve upon the owner and upon the occupier of the land a notice in writing stating their intention so to place the line, and giving a description of the nature of the line and of the position and manner in which it is intended to be placed ;

(*b*) If within fourteen days after the service of the notice the owner and the occupier of the land give their consent to the placing of the line in accordance with the notice, either unconditionally or on terms or subject to conditions acceptable to the undertakers, the undertaker may proceed to place the line across the land in the position and manner stated in the notice ;

(*c*) If the owner or occupier of the land refuses or within the said fourteeen days fails to give his consent as aforesaid the undertakers may, with the consent of the Ministry of Commerce, but not otherwise, place the line across the land in the position and manner stated in the notice.

Sub-section 8, as amended by a subsequent Act (section 5 of the Act of 1935) then enacts : " Where " under this section the consent of the Ministry of " Commerce is required to the placing or retention of " an electric line across any land, the said Ministry " may, if, after giving to all parties concerned an " opportunity of being heard, the said Ministry thinks

" just, give its consent either conditionally or on such " pecuniary or other terms and subject to such con- " ditions and stipulations as it thinks just ; and the " said Ministry in deciding whether to give or withhold " its consent, or to impose any terms, conditions or " stipulations (including the placing of any portion of " the line underground), shall among other considera- " tions have regard to the effect (if any) on the amenities " or value of the land of the placing of the line in the " position and manner proposed."

For the purpose of fulfilling their statutory powers the Board prepared and widely used a standard printed form for agreement with the owners and occupiers of the lands over or under which their electric lines were carried. As I understand the case agreements were in most cases made in accordance with the printed terms. These contained a flat annual rate for all cases based partly on whether the lines were under- ground or overhead and partly on the character of the poles.

The relevant facts of the present case are shortly as follows :—Dr. Robb, the plaintiff, is owner and occupier of lands containing 151 acres on which is a residence known as Lisnabreeny House. He and his predecessor in title have taken all possible precautions to provide that the house and grounds shall be self-contained and not be subjected to any unsightly environment. In particular Dr. Robb's immediate predecessor in title bought at a very high figure a farm in front of Lisnabreeny House which in other hands might have obstructed the fine scenic view from his house and grounds. This farm is at present used for agricultural purposes, but I have little doubt, if put in the market unconditionally and unfettered, it would fetch much more than the price of an agricultural farm.

The defendants, in carrying out their duties and powers under the Electricity Supply Acts, prepared plans which necessarily entailed the carrying of high tension electric lines over the farm lands that had been so acquired, and before taking any steps as to compulsory acquisition some agents of the defendants very properly called on Dr. Robb and showed him the

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proposed line. I should say perhaps that Dr. Robb had previously had a disagreement with the Board as to another electric line which was finally settled and compensation paid. The plaintiff in the statement of claim has pleaded that as that line was actually placed across his lands the defendants have no further powers in regard to them. I cannot regard this contention as tenable.

At the interview with Dr. Robb the defendants' representatives did agree that there was a genuine cause of complaint on Dr. Robb's part by reason of the proximity of the electric line to his house, and suggested an alternative route, to which the plaintiff did not consent but proposed to give consideration. This was not so direct a route from defendants' point of view, and it was proved that the alternative would cost about £20 additional. As no consent was forthcoming on 21st August, 1935, the defendants served a notice under section 37 (2) (*a*) of the Electricity (Supply) Act (Northern Ireland), 1931, enclosing their standard form of consent for his signature, and the accompanying map showed that the proposed route was the alternative shown to Dr. Robb. While the first route suggested would have rendered necessary the erection of two poles on Dr. Robb's land, the position mentioned in the notice only called for a single pole.

Dr. Robb declined to sign the agreement and definitely refused to consent to the placing of the line across his land on 3rd September.

The next step was a letter of 28th October, 1935, from the Secretary of the Board to the Secretary of the Ministry of Commerce :—

[Sir,

I am directed by the Electricity Board for Northern Ireland to make application for the consent of the Ministry of Commerce pursuant to section 37 of the Electricity (Supply) Act (Northern Ireland), 1931, to the placing of an electric line across certain lands at Castlereagh, County Down, the property of Mr. Alfred Arthur Robb, Lisnabreeny, County Down.

I am to point out that the lands in question are

on the route of the high tension line which it is proposed to erect between Rosebank, in the townland of Carnamuck, County Down, and Dunmurry, County Antrim, consent to the erection of which was issued by the Ministry of Commerce on 25th October, 1935.

I am also to inform you that in pursuance of provision of section 37 referred to above, notice of the Board's proposals was served upon Mr. Robb but he refused his consent stating that he did not wish to have any unsightly structures upon these lands which had been expressly purchased to safeguard the amenities of his house.

In this connection I am to point out that it was originally intended to place two poles upon Mr. Robb's lands, but in an endeavour to reach an agreement a re-arrangement was submitted to him, costing the Board an additional £20, whereby one pole was eliminated but he persisted in his refusal to complete the necessary wayleave document.

Accordingly, I am to make application for the consent of the Ministry of Commerce to the placing of the line in the manner as now amended.

A copy of the notice served upon Mr. Robb, together with a copy of the Wayleave Agreement, is attached hereto.

I am, Sir,

Your obedient Servant,

LENDRICK MCMASTER,

Secretary.]

The sending of this copy of the wayleave agreement is interesting in the light of after events. The procedure of the Ministry of Commerce and the Electricity Board in their attitude to such matters bears a strong resemblance to that of the Ministry of Transport and Electricity Authorities in England as seen in *West Midland Joint Electricity Authority v. Pitt* (1), to which I shall have to refer later. If it has any meaning it is a suggestion before the inquiry of the form that the consent to be given by the Ministry should take, and the letter itself only came to the knowledge of the plaintiff in the course of this action. Negotia-

(1) [1932] 2 K.B. 1.

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tions meanwhile took place as regards a less objectionable route which would have entailed additional cost to the defendants. The plaintiff, however, would not agree to this unless the defendants agreed that they would not in the future lay any more lines across his lands, a condition to which, of course, they had no power to consent.

An inquiry was held on 3rd and 17th December, 1935, and on 14th January, 1936. At that inquiry a statement was made on behalf of the defendants by Mr. Hoare, their chief wayleave officer. The plaintiff was represented, but taking the strong line that the defendants were not justified at all in placing lines across his lands, no evidence was offered on his behalf and there was no argument as to the juridsiction of the Ministry of Commerce to award compensation. Apart from wayleave, nothing seems to have been discussed. On 27th January, 1936, the Ministry of Commerce, after giving Dr. Robb a week to accept the last alternative route offered and telling him that unless he did so the Ministry would consent to the application, gave its decision on the matter in the form of the impeached consent. This is embodied in a document entitled :—

"*Electricity* (*Supply*) *Act* (*Northern Ireland*), 1882 *to* 1933.

Consent by the Ministry of Commerce for Northern Ireland to the placing of electric lines across certain lands."

Attached to this is a map showing the route and the form of agreement generally used by the Electricity Board.

After recitals, it states . . . " subject to the terms " and conditions contained in the Board's standard " form of wayleave agreement, a copy of which is " annexed hereto " ; presumably the copy sent in the letter of 28th October, 1935. These terms and conditions are no doubt those which the Ministry " thinks " just " to comply with section 37 (8). It certainly is a curious determination by a quasi-judicial body—adopting as it does terms of a blank consent where the alternative decision applicable requires a close scrutiny,

where no printed clause is struck out, where the word "agreement" is continually used where there is no agreement, and which clearly contains illegal conditions, really involving legislation by the Ministry inconsistent with Parliamentary enactments.

From the material contained in this document, I cannot think that, even if it had the power of giving compensation under section 37 (8) as amended, the Ministry in reality had regard to the effect of the placing of the line of the amenities or value of the land.

I am inclined to think that in giving the consent the Ministry also purported to give the applicable annual sum as full compensation, apparently deciding that the standard form should operate to the same extent on really valuable land and the waste on a mountain top. However, this cannot be more than a matter of surmise, and the defendants have expressly disclaimed that it has this effect. Though Dr. Robb did not assist the Ministry in the inquiry, it had sufficient information to be aware that Dr. Robb's lands and woods were of some value; it was aware of the added expenditure to which the defendants would have put themselves if they had secured a consent. The Ministry also was aware of the £100 compensation previously paid to the plaintiff.

If the consent was intended to give compensation I cannot conceive on the facts as a whole that the Ministry of Commerce in the document emanating from it gave any real consideration to the value of the proprietorial rights of the plaintiff, which would be affected by the operations of the defendants, though I think that in determining the physical position of the line regard was had to the objections of the plaintiff.

I heard evidence as regards value, not for the purpose of an appeal from the Ministry of Commerce, but to be able to form an opinion as to whether, if the Ministry of Commerce were the tribunal which had jurisdiction over compensation, it had complied with the conditions set out in section 37 (8). On this evidence I find as a fact that the value of the plaintiff's lands over which the high tension electric lines are to placed is very considerably diminished, that as building

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lands they are less desirable, and, while not accepting Mr. McConnell's evidence (who fixed the diminution in value at £500) as to amount, I am satisfied that the monetary loss is considerable.

The amenities are in fact affected, and in my view no regard has in fact been paid to this in the amount set out in the agreement, which is only concerned with wayleave pure and simple—the same for the bog and the garden. Except for the impeached condition 3, no regard has been had to the damage arising from the destruction of the trees.

Having obtained the consent, the defendants did on 29th April, notwithstanding vigorous protests made under Dr. Robb's orders, enter on the lands and erected the pole which is the subject matter of the action.

Having come to the conclusion I have expressed, a very serious and difficult question remains to be considered, viz., whether the terms of the consent and conditions attached to it vitiate the consent given by the Ministry of Commerce so that it may be treated as a nullity.

That Ministry is not a party to the proceedings and no proceedings have been brought to have the consent set aside. The defendants rely on the consent, and the position they now take up, as I understand it, is that nothing stated in the " consent " deprives the plaintiff of his rights to compensation under the Act of 1919 or section 17 of the Act of 1882, that the consent only operates as to the position and character of the electric line, and that the compensation is made in money in respect of wayleave only.

The plaintiff's contention is that the Ministry has purported to deal and has dealt with compensation as a whole, that its form and conditions are such as show that it is bad, and further they rely on section 5 of the Government of Ireland Act which forbids legislation to take lands without compensation, and that the use of the word " unconditional " in section 37, subsection 8, involves the power to confiscate lands seeing that easements and such rights as are taken by the defendants come within the definition of land. They attribute the last legislation amending section 37 (8) to

the endeavour to get round a most important decision of the English courts, *West Midlands Joint Electrical Authority v. Pitt and Others; Ministry of Transport v. same* (1), in which Macnaghten, J., and the Court of Appeal decided that the words of section 22, sub-section 1, of the Electricity (Supply) Act, 1919, similar to the words now in section 37 (8), did not permit of an award of pecuniary compensation by the corresponding Ministry whose consent was necessary. The judgments in that case are of vital importance in the consideration of the present, as the principles therein enunciated go much deeper than to the question of " pecuniary compensation."

The plaintiff also contends that an informality regarding the time of service on the Castlereagh Rural District Council, in whose area the lines are placed, also operated to vitiate the consent. This contention to my mind cannot be sustained. It does not affect the plaintiff.

Another contention of the plaintiff is that the form of the consent is bad, as the recitals are insufficient. As I do not see that recitals are in any way necessary to the consent, this contention also fails.

The question of compensation and the method or methods by which it may be obtained by the plaintiff or by which he may be deprived of it present serious difficulties.

In considering this it is perhaps best to try to ascertain what is involved in the English cases I have already mentioned and which for brevity I shall afterwards refer to as " Pitt's Case " (1). These cases have many features in common with that under review. With slight variations the statutory powers are similar, and the procedure is very much the same.

The argument in Pitt's case (1) turned for the most part on the language of section 22 of the Electricity (Supply) Act, 1919. This has, as I have stated, been repealed by the Electricity (Supply) Act (Northern Ireland), 1931, but has in substance been re-enacted with slight variations. In both the consent of a Government Ministry is necessary before lands can be

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entered on, and it is enacted that if, after giving to all parties concerned an opportunity of being heard, such Ministry may if it thinks just give its consent either unconditionally or on terms and subject to such conditions and stipulations as it thinks just; and on the amenities or value of the land of the placing of the line in the position and manner proposed.

For practical purposes as these enactments originally stood the only real difference in language was that the Northern Ireland Act amplified the enactment by adding the word "position" to "manner," perhaps emphasising that the location should be considered.

An amending Act of Northern Ireland was passed after the judgment in the English Courts, the Electricity (Supply) Act (Northern Ireland), 1933, by which the words "unconditionally or on such terms" were expanded into "unconditionally or on such pecuniary "or other terms." Whether this amendment, apart from the argument based on section 5 of the Government of Ireland Act, 1920, has any practical effect, seems to me very doubtful as for reasons which I shall state later, they do not make any alteration in the persons who are to assess compensation.

How, then, have the words—of course excluding the amendment made by the Electricity (Supply) Act (Northern Ireland), 1933—been interpreted by the English Courts. *In Pitt's case* (1), Macnaghten, J., at p. 29 says: "I think that the words 'terms, con- "ditions and stipulations' do not mean or include "pecuniary terms. In my opinion it is for the Minister "to consider whether the proposal to place an electric "line across any land should be sanctioned, and if he "is of opinion that it should be sanctioned, he is then "to consider what terms (other than pecuniary terms) "ought to be attached to his consent. It is not for "him to decide what compensation the land owner "ought to receive." At p. 36 of his judgment, the learned judge had dealt with the use of the word "unconditionally," and had shown in convincing language, as is done later by the Appeal Court, that this must be interpreted as merely an unconditional

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assent to the placing of the lines (Slessor, L.J., at pp. 47-48) and not as affecting compensation. This would put an end to the point so strenuously argued by Mr. McGonigal that the Northern Ireland Acts, in purporting to enable the Ministry of Commerce to take land (including an easement) unconditionally, in other words, without compensation, would be *ultra vires* the Parliament and be invalid. I may state here that notwithstanding *Escott v. Newport Corporation* (1), I consider that the proposal of the defendants in this case involves the taking of land. The Northern Ireland Act is in the same words as section 22 of the 1919 Act as regards this, and is even stronger in its reference to location by use of the word " position." Consequently on the interpretation of the word " unconditionally " by the English Courts, the Electricity (Supply) Act (Northern Ireland), 1931, is unimpeachable.

It is necessary, however, to consider the amending Act which introduces the word " pecuniary or other," and it would appear that the Ministry of Commerce formed the opinion that by this enactment it had power to deal with the question of compensation. I am inclined to the view that this amendment may be held to affect wayleave conditions only—reading the conjoint legislation—all the Acts are one code and must be read together, and as pointed out in *Pitt's case* (2), the legislature must not be presumed to take away rights given in other parts of the code without clear language. So reading the Acts, it is perhaps legitimate to assume that in determining the location of the electric lines and their maintenance, the legislature gave the Ministry more extensive powers in dealing with different locations but did not take away existing rights as to compensation to landowners. It would be going very far to assume that the introduction of these words had the effect of repealing the previous rights of owners as regards compensation without making the slightest reference to such provisions, which were explicitly part of the code.

(1) [1904] 2 K.B. 369. (2) [1932] 2 K.B. 1.

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Indeed, that was the real argument put forward by defendants' counsel; they explicitly stated that, notwithstanding the Ministry of Commerce's consent, which they asserted was valid, the plaintiff was entitled to resort to the Act of 1919 and section 17 of the Act of 1882—that compensation was made in money in respect of wayleave only.

So far as the plaintiff's argument that the legislation was invalid by reason of the Government of Ireland Act, 1920, section 5, is concerned, it is clear from the decision of the English Court of Appeal that the earlier Act did not take away the right to compensation, and this cannot be affected by an invalid Act, which on the plaintiff's argument the 1933 Act was.

On the whole I have come to the conclusion that the functions of the Ministry of Commerce in regard to these Acts is to give or refuse consent unconditionally or on terms pecuniary or otherwise to the position and manner in which electric lines are to be placed.

So far as this function is concerned the Ministry has given its consent to the placing of the line across plaintiff's lands after the due formalities have been observed, but it has attached to the consent a number of terms and conditions that certainly suggest that the Ministry has misconceived its powers, and has, even in giving a pecuniary award for wayleave, not given proper regard to the matters which the Statutes required it to consider. The form in which the consent is given is also of a bewildering character. It is strongly contended by the plaintiff that in its form it is not a consent such as is required by the Electricity Acts.

In *Pitt's case* (1) the consent was to some extent—though not to so great an extent—affected by the same or similar erroneous misconceptions. It was affected by the same difficulties arising from quasi-judicial functions being imposed on an administrative body referred to by Macnaghten, J., in *Pitt's case* (1), at p. 28: "It appears from the correspondence which has "been put in evidence, that on February 20, 1930, "after it was known that the question at issue between "the Joint Authority and the defendants was the

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" amount of the compensation which ought to be paid, " the clerk to the Joint Authority wrote to the Secretary " of the Ministry of Transport urging that, for the " reasons therein set out, the Ministry ought to reject " the claim of the defendants for any greater com- " pensation than that which the authority were willing " to give. I presume that the clerk to the Joint " Authority would have realised the impropriety of " addressing any such communication behind the back " of the other side to any judicial or quasi-judicial " tribunal such as an arbitrator, but he obviously did " not see anything improper in writing such a letter " to the Ministry of Transport.

" I was told that the letter was disclosed under the " order for discovery in this action, and that until then " the defendants were not aware that any such letter " had been written. Whether the letter did or did not " influence the decision of the gentleman to whom the " Minister delegated the duty of deciding the matter " is quite immaterial. When one party is permitted " to make representations to the tribunal--whether it " be a court of justice, or an arbitrator, or the Minister " of Transport—without the knowledge of the other " party, it is not possible to obtain even-handed " justice."

The Ministry of Transport in *Pitt's case* (1) purported to give pecuniary compensation which was held to be illegal. The terms and conditions also incorporated by reference the terms and conditions in the form of consent which the undertakers had submitted to the Minister, but in that case some of these conditions were struck out, and in one, at any rate, an alteration was made. There do not appear to have been the alternatives and blanks which are so conspicuous in the consent under my consideration.

Though in *Pitt's case* (1) the landowners by counterclaim—and in that case the appropriate Ministry was before the Court as well as the undertakers—asked that the consents should be declared *ultra vires* and void. They did not seem to follow this up in their arguments, indeed it was not necessary for them, and

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no declaration was made to this effect. The consents, so far as they were not specially vitiated by erroneous conditions, were not disturbed by the Court. The illegal parts so far as they were challenged were treated as inoperative. I have been asked by the defendants here to disregard illegal terms and to treat these as severable. The chief difficulty I have in doing so is that the form of the documents giving the consent shows such a misconception by the Ministry of the extent of its functions. The Ministry was mainly concerned with one decision, viz., whether the lines should properly be placed over the plaintiff's lands, in the route mentioned in the defendant's application, and as regards that I do not think the Ministry's decision is reviewable by the Courts. Indeed it is hardly contended that placing the electric lines over his lands was unavoidable. A definite application was made by the defendants for the consent of the Ministry to the lines being placed on a definite route. An alternative was offered at the inquiry and rejected, and, while I am of opinion that there is no appeal to the Court as regards the approval or non-approval of the route when there is nothing bad on the face of the documents on that head, I hardly see that the Ministry, considering the *non-possumus* attitude of Dr. Robb, could have come to any other decision as to the location of the line mentioned in the application. The great difficulty I have is the manifest disregard of any judicial consideration of the value to be attached to the wayleave. It may be that *qua* wayleave the rental was sufficient. Compensation for damage other than wayleave in my opinion is still assessable under the various Acts. As regards wayleave itself the plaintiff gave no assistance, and if he suffered in regard to this he is at any rate a contributory factor. He has not taken any steps to have the consent set aside against the Ministry, and on the whole with very considerable doubt, I feel called upon to hold that the defendants under the consent of the Ministry have entered lawfully upon the plaintiff's land and consequently that this action is unsustainable, and must be dismissed with costs

ANDREWS, L.J., delivered the judgment of the Court as follows :—

This is an appeal by the plaintiff from an Order of Megaw, J., dated 7th July, 1936, dismissing the plaintiff's action, which was brought to obtain an injunction and damages in respect of the alleged wrongful entry by the defendants upon the plaintiff's lands and the erection of a pole thereon.

The facts are so fully and clearly set forth in the judgment of the learned Judge that we do not intend to repeat them further than is absolutely necessary to make clear the several legal issues involved.

The plaintiff's residence at Lisnabreeny House is situated in an estate of 157 acres and enjoys a commanding view of the upper reaches of Belfast Lough. The amenities of the estate and residence, which have been carefully preserved, add appreciably to its value

On 21st August, 1935, the defendants caused to be served upon the plaintiff a notice in writing under section 37 of the Electricity (Supply) Act (Northern Ireland), 1931, of their intention to place an electric line above ground across the plaintiff's lands, and requesting the plaintiff to sign their standard form of wayleave agreement, which contained the ordinary wayleave rentals and incorporated certain terms and conditions. The schedule attached to the notice contained a description of the proposed line, which would have involved the erection of two poles, and a plan attached to the agreement form showed the route which it was proposed that the line should take. This route crossed the plaintiff's lands in view of the front windows in a manner which would have substantially affected the amenities and value of the plaintiff's lands and residence.

The plaintiff refused to sign the agreement, and in due course an Inquiry was held under section 37 (8) of the Act of 1931 by an official of the Ministry of Commerce and on their behalf for the purpose of ascertaining whether the said Ministry should give or refuse its consent to the placing of the said electric line across the plaintiff's lands in the manner proposed.

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Owing to illness the plaintiff was unable to appear at either the first or any of the adjourned hearings of the Inquiry. Negotiations took place as to alternative routes. The first of these, which involved the erection of only one pole on the plaintiff's lands and was further removed from plaintiff's house, was put forward by the defendants before the Inquiry was called for. The second alternative route, still further removed from the plaintiff's house, was proposed by Captain Dashwood, whose services had been retained by the plaintiff. Both of these proposals involved increased expenditure. The former was rejected by the plaintiff. The latter was acceptable to him, but only upon the condition that the defendants would undertake that no additional line would thereafter be placed across his lands. This request for an undertaking was prompted by the fact that in the year 1932 another electric line had been placed by the defendants across the plaintiff's lands at the back of his house. The defendants stated, through their wayleave officer, that, whilst the possibility of another line being placed across the lands in the near future was very remote, they could not and would not give the undertaking. In these circumstances the Ministry of Commerce on 27th January, 1936, issued their formal consent to the defendants placing the line across the plaintiffs' lands as shown on an annexed plan (the first alternative route above referred to) subject to the usual nominal sums in respect of wayleave rental and to the terms and conditions contained in the defendants' standard form of wayleave agreement, and also subject to power being reserved to the Ministry to review the consent at any time after 27th January, 1941. The consent contained a recital that the Ministry had fully considered the matter, including the effect of the placing of the line in the manner proposed on the amenities or value of the land.

The plaintiff, through his solicitors, immediately took exception to the consent, alleging that it was invalid and *ultra vires*, and intimated that he would issue a writ in the Chancery Division for an injunction to restrain entry and trespass ; but the defendants,

refusing to be deflected from their course, entered the plaintiff's lands by their contractors, and erected the pole which the plaintiff now seeks to have removed.

The grounds upon which the plaintiff relies are set forth in the amended statement of claim. The first of these is a submission that section 37 (8) of the Act of 1931, as amended by section 5 of the Electricity (Supply) Act (Northern Ireland), 1933, is *ultra vires* the Parliament of Northern Ireland as being in contravention of the provisions of section 5 of the Government of Ireland Act, 1920, and that the consent given by the Ministry of Commerce was, accordingly, *ultra vires* and void. Alternatively, it was submitted that, if such legislation was valid, the Ministry gave its consent without making provision for compensation contrary to section 17 of the Electric Lighting Act, 1882, and to section 5 of the Government of Ireland Act, 1920, and that in consequence the consent was null and void. It will be convenient to consider these submissions, which lie at the root of plaintiff's case, before referring to the objections which are based upon alleged irregularities and informalities appearing on the face of or connected with the obtaining of the consent.

Section 17 of the Act of 1882 enacts that in the exercise of their powers the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them, the amount of such compensation in case of difference to be determined by arbitration. Section 5 (1) of the Government of Ireland Act, 1920, in so far as is material, provides that the Parliament of Northern Ireland shall not make a law so as directly or indirectly to take any property without compensation. It further declares that any law made in contravention of the restrictions imposed by the sub-section shall, so far as it contravenes those restrictions, be void. The sub-section as a whole is in more than one respect unhappily drawn, but we shall assume that when it prohibits Parliament from making a law to take property without compensation this means that it shall not authorise it to be so taken.

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Now the plaintiff's contention is that such a contravention is effected by 37 (8) of the Electricity Act of 1931 as amended by section 5 of the Act of 1933. The former sub-section provides that where under the section the consent of the Ministry of Commerce is required to the placing or retention of an electric line across any land, the said Ministry may, if, after giving to all parties concerned an opportunity of being heard, the said Ministry thinks just, give its consent either unconditionally or on such terms and subject to such conditions and stipulations as it thinks just ; and the said Ministry, in deciding whether to give or withhold its consent, or to impose any terms, conditions or stipulations (including the placing of any portion of the line underground), shall, among other considerations, have regard to the effect (if any) on the amenities or value of the land of the placing of the line in the position and manner proposed. It was upon similar words contained in section 22 (1) of the Electricity (Supply) Act, 1919 (which by section 37 (12) of the Act of 1931 has ceased to have effect in Northern Ireland), that the Court of Appeal (affirming the decision of Macnaghten, J.), held in *West Midlands Electricity Authority v. Pitt and Minister of Transport v. Same* (1), that the " terms, conditions and stipula- " tions " which the Minister of Transport might attach to his consent do not include pecuniary terms, and that the owner of land was entitled to receive compensation and to have the amount of it assessed under section 17 of the Act of 1882 by an arbitrator appointed under section 28 of that Act, or, in cases where the Acquisition of Land (Assessment of Compensation) Act, 1919, applies, by an official arbitrator under that Act. It was obviously this decision which led to the passing of section 5 of the Act of 1933 by which the Parliament of Northern Ireland provided that sub-section (8) of section 37 of the Act of 1931 should have effect, and should be deemed always to have had effect, as if in that section for the words " on such terms " there were substituted the words " on such pecuniary or other " terms." It is upon the introduction of these words

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" pecuniary or other " into the section that the plaintiff's argument upon this part of the case has mainly rested, the contention being that the Minister of Commerce in the present case has acted under a section which is void, as the powers conferred upon him were so wide that he might have awarded no compensation at all contrary to the provisions of section 5 of the Government of Ireland Act. Personally, we doubt if these words are any more open to objection than the word " uncon- " ditionally " contained in section 37 (8) of the Act of 1931, to which no objection on the ground of *ultra vires* was taken in the argument addressed to us ; for, as Romer, L.J., pointed out in *Pitt's case* (1), at p. 54, " unconditionally " may well mean " without the " payment of any compensation whatever." But, even if the words have a wider meaning, we are not prepared to hold that they were intended to or that they had the effect of impliedly repealing section 17 of the Act of 1882, which imposes upon the undertakers the necessity to make full compensation to be determined in case of difference by arbitration. Neither the Act of 1931 nor the Act of 1933 effected an express repeal of that section, nor did either Act even refer to its provisions ; and, when we find, as we do, in section 59 of the Act of 1931 and in section 11 of the Act of 1933, that the Electricity Acts of 1882-1919 and the Acts of 1931 and 1933 are all to be construed as one and cited together as the Electricity (Supply) Acts (Northern Ireland), 1882 to 1933, it seems to us that it is our duty, if possible, to give such a restricted meaning to the sections of the later Acts as will avoid any conflict with the former. Equally is it our duty, if possible, to avoid a construction which would make the legislation *ultra vires*. Accordingly, we hold that when the Ministry of Commerce give their consent under section 37 (8) of the Act of 1931 (as amended) and impose terms, whether pecuniary or otherwise, it is not competent for them to usurp the functions of an arbitrator under section 17 of the Act of 1882. The Ministry's real duty in such a case is to determine whether or not they will give their consent to the erec-

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tion of the poles and wires on the line proposed. In determining this they must have regard to the effect (if any) on the amenities or the value of the land. If they give their consent they can do it unconditionally, or they can impose terms financial or otherwise, as, for example, by fixing a rental for the wayleave right. But such matters are only incidental to the exercise of their main jurisdiction. They are not bound to impose any terms ; and in the present case, where the plaintiff's case at the inquiry simply was that the defendants were not justified at all in placing the line across his lands, and no evidence was given as to the value which should be set on the loss of amenities, and where, as expressly admitted by the defendant's counsel, no sum has been allowed in respect thereof, the plaintiff is in our opinion clearly entitled to have this regarded as a head of damage for which he has a right to receive compensation from the arbitrator under section 17 of the Act of 1882.

Another circumstance which satisfies us that Parliament never intended to do away with the right to compensation under section 17 is that in a case such as the present there might well be other heads of damage which could not, as we read section 37 (8), be the subject of compensation under it. Interference with possible building development in the future, or damage done during the execution of the works, such as is alleged to the plaintiff's well in the present case, afford illustrations of appropriate heads of damage for consideration by an arbitrator.

Holding, therefore, as we do, (1) that section 37 (8) of the Act of 1931 and section 5 of the Act of 1933 were *intra vires* of the Parliament of Northern Ireland, and (2) that the right to obtain full compensation exists under the Act of 1882, the jurisdiction of the Ministry to make the impugned consent is established, and such consent cannot be declared null and void on the grounds referred to.

Before leaving this part of the case we would merely state as a matter of record that the plaintiffs' right to have compensation assessed by arbitration under section 17 of the Act of 1882 is expressly admitted by the defendants.

We pass now to a consideration of the further arguments directed against the consent. In the first place, it is alleged that it is bad on its face, and this argument is supported on several grounds. It is contended that it is defective in not reciting that all parties concerned had an opportunity of being heard, and it is urged that in fact the Castlereagh Rural District Council had no notice of the Inquiry. The absence of such a recital is in itself in our opinion quite immaterial, as there is no statutory or other form prescribed for the consent. As regards the alleged want of notice, even assuming, which we do not decide, that it is competent for the plaintiff to raise the point, we think the Council must be taken to have waived their right by their Clerk's letter of 12th October, 1935, in which he stated that the Council had no objection to the proposal provided the consent of the County Surveyor be obtained. We cannot accept the proposition contended for at the Bar that the plaintiff had a right to the Council's representation at the Inquiry on the ground that it was their duty to support him—a prominent ratepayer—in his opposition to the scheme, quite irrespectively, apparently, of any prejudice which might be caused to other ratepayers by the diversion of the line.

Secondly, it was pleaded in paragraph 10 (*b*) of the statement of claim that the consent was bad on its face, as it failed to recite that the Ministry had had regard to the effect on the amenities or value of the lands of the placing of the line in the position and manner proposed. This contention was based on the fact that the recital stated that the Ministry "had "fully *considered* the matter" instead of stating that they "had *had regard* to it." It was said that they might have "considered" the amenities without paying any "regard" to them. Such a suggestion is in our opinion rather an unworthy one, and we decline to entertain a charge of what would be nothing other than fraudulent trickery on the part of the Ministry, who, in our opinion treated these terms as being synonymous.

In the next place, it is urged that quite apart from

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the form of the recital the Ministry must in fact have failed to have regard to the effect on the amenities or value of the land of the placing of the line in the position and manner proposed, as the amount of the rental fixed by the Ministry is the nominal sum inserted in the defendants' standard wayleave agreement.

We entirely agree with Megaw, J., that, if the consent was intended to give full compensation, it did not give any real consideration to the value of the proprietorial rights of the plaintiff which would be affected by the operations of the defendants, as it is clear from the maps, photographs, and admitted circumstances of the case that the damage to the plaintiff's house and lands, both actually as a residence and farm and potentially as a site for building operations, is appreciable and certainly considerably more than nominal in character. At the same time, we are not prepared to reject the findings of the learned Trial Judge that "in determining the physical position of the line "regard was had to the objections of the plaintiff" (Appeal Book, p. 136), and that "it may be that *qua* "wayleave the rental was sufficient" (Appeal Book, p. 145). In our opinion the Ministry, who were hampered in their task by the failure of the plaintiff to produce any evidence of loss of value, sufficiently complied with their obligations under the section when, in determining the physical position which the line should take, they had regard to the amenities or value of the land. It would neither be equitable nor proper that a landowner who refrained from giving evidence of loss of value should be entitled to set aside a consent of the Ministry on the ground of inadequacy of the annual rental awarded to him. His only remedy must be at the arbitration, which the defendants admit must be held for the assessment of what is referred to in the Statute as "full compensation . . . for all "damage sustained . . . by reason or in consequence "of the exercise of such powers." In our opinion it will be not only competent for, but it will be the duty of the arbitrator in assessing such compensation, whether by annual rental or otherwise, to have regard to the nominal character of the wayleave rental contained in the consent.

The plaintiff further challenges the validity of the consent on the ground that it imposes on him terms and conditions which are in contravention of the provisions of the Electricity (Supply) Act (Northern Ireland), 1931. It is contended that the Ministry's consent is expressly made subject to the terms and conditions contained in the Board's standard form of wayleave agreement, a copy of which was annexed, and also to the power being reserved to the Ministry to review the consent at any time after the 27th January, 1941. Admittedly, as a matter of legal draftsmanship, the incorporation in a departmental order of the provisions of a document which is in form a consent *inter partes* is most unfortunate, but this should not in our opinion vitiate the entire order. Rather is it our duty to have regard to the controlling words of the consent itself, and by a *mutatis mutandis* construction to give legal effect to the obvious meaning of the clauses of the incorporated document. Bad draftsmanship cannot in itself invalidate a document and render it void *ab initio*.

Clause 3 of the conditions annexed to this incorporated agreement was the subject of special attack by plaintiff's counsel, who contended that the power which it confers on the defendants in regard to the felling or lopping of trees is in the teeth of the provisions of section 39 of the Act of 1931. The defendants have not attempted to justify it—neither have they sought to enforce it. They recognised that the plaintiff's statutory rights in regard to the lopping of trees could not be nullified by order of the Ministry; and, accordingly, on 23rd April, 1936, their secretary wrote to the plaintiff a letter giving formal notice in pursuance of the provisions of section 39. In these circumstances we are of opinion that the consent cannot be declared null and void merely because there is attached to it a condition which is unenforced and unenforceable, conferring an additional right upon the defendants. We regard it as severable, and not an essential part of the consent—something entirely different in character from a condition conferring a right or privilege upon the plaintiff which might

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reasonably be regarded as a consideration for the consent; for in such a case both would necessarily stand or fall together. In our opinion the existence of condition 3 cannot totally invalidate the consent to place the line across the plaintiff's lands, and so make the defendants mere trespassers.

The plaintiff further impeaches the consent on the ground that it reserves power to the Ministry to review the consent at any time after 27th January, 1941. There is nothing in the Statutes against the reservation of such a power, which is obviously a reservation in plaintiff's interest; and the existence of a similar reservation in the consent in *Pitt's case* (1), did not induce the Court to set that consent aside.

The plaintiff's last point was that the Ministry had no power or authority to consent to the placing of this—a second line—on the plaintiff's lands. This contention, which was based upon the wording of section 37 of the Act of 1931, is quite untenable.

One further defence to the plaintiff's claim in trespass has been urged—in our opinion with great weight—by the defendants. They justify under the consent which must remain and be regarded as a valid subsisting document until, if reviewable at all by the Courts, it is set aside in a properly constituted suit or other proceeding in which such relief is specifically claimed. In our opinion it is not competent for the plaintiff, who deliberately refrained from making such a claim, to ask the Court to treat the consent as a nullity. Moreover, it would in our opinion be wholly irregular for the Court to set aside the Ministry's consent in a suit in which they were not a party, and in which they were, accordingly, denied a right of being heard in its support. It is no answer to this argument to say, as the plaintiff contended, that the Ministry was *functus officio* in regard to the consent; for, even if that view were accepted, which we must not be understood as deciding, it would not afford any reason why the Ministry, whose statutory existence continues, should not be joined as a defendant in an action affecting the validity of their statutory act.

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For these reasons we are of opinion that the order of Megaw, J., dismissing this action is correct and that it should be affirmed. Having regard, however, to the irregularities in the Ministry's consent to which we have referred and to the doubts which existed in regard to the construction of the Statutes, we are of opinion that the appeal was reasonably brought, and that no costs should be allowed to either party in this Court.

Solicitors for plaintiff and appellant: *Johns, Elliot & Johns.*

Solicitor for defendants and respondents: *Robert Wallace.*

J. R.

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Feb. 8.

Valuation—Rates—Poor Rate—Exemption—Hereditament of a "Public Nature"—"Used for Public Purposes"—Hall—Association for improving the Conditions and Amenities of Rural Life—Poor Relief (Ireland) Act, 1838 (1 & 2 *Vic., c.* 56), *section* 63—*Valuation (Ireland) Act*, 1852 (15 & 16 *Vic., c.* 63), *section* 16—*Valuation (Ireland) Amendment Act*, 1854 (17 & 18 *Vic., c.* 8), *section* 2—*Valuation Acts Amendment Act (Northe Ireland)*, 1932 (21 & 22 *Geo.* 5, *c.* 26), *section* 3.

A Hall used and occupied by the Women's Institute of Garvagh was held by the respondent as trustee for the said Institute. The Institute was an association of women, formed with the object of improving the conditions and amenities of rural life.

The membership of the Institute was confined to women and girls over fifteen years of age, who had to be proposed and seconded by members of the Institute before being elected.

Each member paid a subscription of two shillings per annum. The Hall was provided primarily for the women of Garvagh district but there were members who resided in other districts. Dances and dramatic entertainments were held to which the public were admitted on payment of an entrance fee. Badminton was played two nights a week and the badminton club was open to the public on the payment of a separate subscription.

The Hall was not used by the members for any private purpose.

Held, reversing the decision of the Recorder of Londonderry, that the Hall was not a hereditament of a public nature and used for public purposes so as to be exempt from poor rate.

CASE STATED pursuant to the provisions of section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, by the County Court Judge and Chairman of Quarter Sessions for the County of Londonderry on the application of the Commissioner of Valuation for Northern Ireland, the said Commissioner being dissatisfied with the determination (hereinafter set forth) as being erroneous in point of law.

This case relates to an appeal by Dorothea Florence Macausland (hereinafter called the appellant) against

(1) In the King's Bench Division before Best, L.J., and Brown, J.

the entry made in the Valuation Lists in respect of a Hall situate at Garvagh, in the County of Londonderry, by the Commissioners of Valuation in the course of the general revaluation directed by the Valuation Acts Amendment Act (Northern Ireland), 1932.

The appeal was heard on 29th day of January, 1936, at General Quarter Sessions held at Coleraine.

The premises in question are held by the appellant under a lease for 99 years subject to a rent of £6 per annum. No trust is declared by the said lease or in any other document but the appellant took the premises as a site for the said Hall and admitted that she held as a trustee for the Women's Institute of Garvagh hereinafter mentioned.

The Hall was built in 1933 at a cost of approximately £400. It is constructed of wood and felt, sheeted inside and erected on concrete piers. It is lighted by electricity, has heating apparatus installed and seating capacity for about 300.

The premises are occupied and used by the Women's Institute of Garvagh (hereinafter called the Institute), the establishment of which was promoted by the Rural Development Council of Northern Ireland. The latter body is the advisory body to the Carnegie United Kingdom Trust on applications for assistance from Northern Ireland, and it includes among its aims the development and improvement of conditions of rural life.

The constitution and management of the Institute are set out and provided for in rules laid down by the said Rural Development Council. These rules are accepted by the members of the Institute and the management is vested in a committee elected by secret ballot at the annual meeting of the Institute in accordance with the said rules.

The membership is confined to women and girls over fifteen years of age, who must be proposed and seconded by members of the Institute before being elected.

Each member pays a subscription of two shillings per annum, one shilling and ninepence of which is retained by the Institute and threepence is forwarded as an affiliation fee to the central fund of the said

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Rural Development Council, but it is segregated by the Council and used solely for the promotion of Women's Institutes in Northern Ireland. Each member receives a membership card.

The Institute and, in particular, the use of the Hall are also subject to other rules laid down by the said Rural Development Council.

Evidence was given on behalf of the appellant by Mr. Laughton, secretary to the said Rural Development Council, Mrs. Kerr, secretary of the Garvagh Women's Institute and Mrs. O'Kane as to the user of the said premises and on their evidence the learned Recorder found the following facts :—

(*a*) There are at present 60 members of the Institute paying an annual subscription of two shillings. All are proposed and seconded as above-mentioned ;

(*b*) The Hall was provided primarily for the women of Garvagh district and most of the members reside in that district. There are members, however, living as far away as Limavady and Ballymoney ;

(*c*) Letting of the Hall is allowed subject to the rules so long as the receipts are paid into the funds of the Institute ;

(*d*) Dances and dramatic entertainments are held to which the public are admitted on payment of an entrance fee ;

(*e*) Badminton is played two nights a week. Play is not confined to members of the Institute and the badminton club is open to the public on payment of a separate subscription ;

(*f*) The Women's Institute Movement is extensively developed in England and Scotland but is in its initial stages in Northern Ireland. There are, counting the Garvagh branch, six Women's Institutes in various parts of Northern Ireland. The Garvagh branch is the only one in Northern Ireland which at present has a Hall of its own ;

(*g*) The Hall is not used or available by or for the members for any private purpose and in this way differs from a club.

The monies derived from any entertainments, badminton and dances are paid into the Women's Institute

bank account together with the members' subscriptions (less the threepence contribution to the central fund) and are used solely for the purposes of the said Institute.

It was contended on behalf of the appellant that the object underlying the establishment of Women's Institutes of the said Rural Development Council was for the benefit of the whole community and that as this particular Institute was a branch established to further such object the whole community was benefited through its members and therefore the said premises were altogether of a public nature within the meaning of section 16 of 15 & 16 Vic., c. 63, and section 2 of 17 Vic., c. 8.

The Institute is not carried on for the purposes of profit.

On behalf of the Commissioner of Valuation it was contended that the right to exemption depended upon the actual user of the hereditament rather than the general objects of the parent body ; that the hereditament served but a class or district and was not available for use by the general public as of right ; and that, on the evidence, it was not of a public nature or altogether of a public nature.

I was of opinion that the said premises were altogether of a public nature and held that they should be distinguished as under section 2 of 17 Vic., c. 8. The valuation of £13 was not disputed and I affixed it.

The question for the Court is : Whether I was right in law in holding the said premises to be altogether of a public nature and entitled to be distinguished under section 2 of 17 Vic., c. 8.

Warnock, K.C., *MacDermott, K.C.*, and *Miller* for the Commissioner of Valuation :—

By section 16 of the Valuation (Ireland) Act, 1852, premises shall not be deemed to be of a public nature so as to be exempt for rating purposes under section 63 of the Poor Relief (Ireland) Act, 1838, unless they are altogether of a public nature. In order that premises shall qualify for exemption as being of a "public "nature," each individual member of the whole

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community must have an interest in the premises. That is, such an interest as the law will recognise and protect should occasion arise. Here a mere payment of two shillings does not entitle a member of the public to any rights or privileges attaching to the hall. This can only be enjoyed by persons who are duly proposed and seconded and become members of the Institute.

The public purpose must be one in which every member of the community has an interest: *Mayor of Limerick v. Commissioner of Valuation* (1). In the *Provost, etc., of Trinity College v. the Commissioner of Valuation* (2), Kenny, J., said at page 519: "It is "sufficient for me to say with reference to the questions "of law submitted in the 'Case Stated' that in all "the Irish authorities where the question of the "meaning and application of the words 'used for "'public purposes' or 'altogether of a public nature' "or 'used exclusively for public purposes,' has arisen, "it has been uniformly determined that the 'user,' "essential in order to establish exemption, must be "available for all subjects of the realm; the 'purposes' "must be purposes in which every member of the 'community has an interest; and the premises must "be used for the public benefit of the whole com-"munity, and not for the private or exclusive use "of any members, or any particular class or section "of it."

In *Commissioner of Valuation v. Sligo Harbour Commissioners* (3), the property of the Sligo Harbour Commissioners was held to be "dedicated to or used "for public purposes" on the ground that "the Sligo "Harbour is open to use by all Her Majesty's subjects "desiring to exercise the public right of navigation."

[They also referred to *The Corporation of Cork v. the Commissioner of Valuation* (4); *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (5); *University College, Cork v. Commissioner of Valuation* (6) and *The Pembroke Urban District Council v. The Commissioner of Valuation* (7).]

(1) I.R. 6 C.L. 420.
(2) [1919] 2 I.R. 493, 519.
(3) [1899] 2 I.R. 214.
(4) [1916] 2 I.R. 77.
(5) I.R. 2 C.L. 577.
(6) [1911] 2 I.R. 593.
(7) [1904] 2 I.R. 429.

Murphy, K.C., and *Nicholson* for the respondent :—

The Women's Institute is an organisation for the benefit of the community as a whole. The hall was founded and is used for the benefit of the entire community. There is nothing in the rules to suggest that the Institute is a closed corporation.

The fact that members pay an annual subscription of two shillings does not disentitle the Institution to exemption. In the *Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (1), notwithstanding the necessity of paying toll the bridge was held to be a work for "public purposes." In that case the Londonderry Bridge Act, 1859, constituted a Board of Commissioners, with power to lend money to be applied to the construction of a bridge. The Act also empowered the Commissioners, when the bridge should be completed to erect toll-houses and take tolls and directed the tolls to be applied first, in payment of the costs of the Act ; secondly, in payment of an annual sum to the Irish Society ; thirdly, in payment of the expenses of maintaining the bridge in proper condition ; fourthly, in payment of interest on money borrowed under the Act ; fifthly, in forming a sinking fund for the payment of the money as borrowed ; and lastly, the Act directed that the residue of the tolls should, from time to time, be invested and applied in forming a sinking fund for the annual expenses connected with the bridge tolls, to the end that it might become toll free. It was held that the tolls and toll-houses were hereditaments "dedicated to or used for "public purposes" and therefore exempt from rating.

There need not be universality of benefit in order to be entitled to exemption. In *The Pembroke Urban District Council v. The Commissioner of Valuation* (2), the Ball's Bridge Branch of the Pembroke Technical Schools derived its funds from four sources : (1) a special rate levied by the District Council ; (2) the Parliamentary grant at the disposal of the department of Agriculture and Technical Instruction ; (3) the Equivalent Grants fund, and (4) a non-compulsory fee

(1) I.R. 2 C.L. 577. (2) [1904] 2 I.R. 429.

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of two shillings and sixpence per head charged to the pupils and expended in providing light and fuel for the school and cleaning the school windows. The school was managed by a committee which was partly composed of members of the Pembroke Urban District Council and partly of other persons interested in technical education, some of whom resided outside the district. It was held that the school was "dedicated "to or used for public purposes," so as to be within the exemption of the Valuation Acts, and that the receipt of the fee of two shillings and sixpence per head from the pupils did not, under the circumstances, disentitle it to the exemption.

Warnock, K.C., was not called upon to reply.

BEST, L.J.

BEST, L.J.: This matter comes before us by way of case stated from a decision of the Recorder of Londonderry. It concerns a Hall situate in Garvagh, in the County of Londonderry. The Commissioner of Valuation in the course of carrying out the general revaluation directed by the Valuation Acts Amendment Act (Northern Ireland), 1932, placed upon this particular Hall, in the occupation of the Trustees of the Garvagh Women's Institute, a valuation of £13 a year. Notice was given of intention to appeal to general or quarter sessions for the Coleraine division of the County of Londonderry on the following grounds:— (*a*) That the rateable valuation of the said premises was over-estimated; (*b*) That the said premises were being used for public purposes on behalf of the Women's Institute of Garvagh and were of a social and educational nature.

The second ground is the only point with which we have to deal. If the premises were being used for the purposes set out in section 63 of the Poor Relief (Ireland) Act, 1838; that is, if they constitute a hereditament altogether dedicated to public purposes then they are to be exempt unless any private profit or use shall be directly derived therefrom.

The question we have to decide is whether these premises are wholly dedicated to or used for public purposes.

Section 16 of the Valuation (Ireland) Act, 1852, provides that for the purpose of such valuation, no hereditaments or tenements or portions of the same shall be deemed to be of a public nature within the meaning of the Act, unless such hereditament or, tenements or portions of the same, respectively, shall be altogether of a public nature.

In this case a very estimable association was formed, called the Women's Institute of Northern Ireland and it became affiliated to the Rural Development Council of Northern Ireland. The Institute is, I think, probably doing good work for its members and may be of use to others who are not members by the example which it sets before them but the good it actually accomplishes is very largely confined to its own members.

In order to join the association a person must be proposed and seconded by members of the Institute and the name of the member proposing and of the member seconding must be sent to the secretary of the Institute by the proposer. The candidate for membership must promise to pay an annual subscription of two shillings and promise to keep the rules and bye-laws of the Institute and all rules and regulations made for Women's Institutes by the Central Committee for Women's Institutes in Northern Ireland.

The Institute is not open to the public generally. Its advantages are open only to women and girls of 15 years and upwards and those who become members must submit themselves to the ordeal of election and there is the possibility that a person may be rejected. There was also the fee of two shillings a year to be paid and a person might cease to be a member and have to go up for election again.

I think it is idle to say that the Society has been established for public purposes. The Hall has been established for those particular young ladies and women in the neighbourhood who wish to join the Society. No doubt it is designed to benefit the community generally. I think that this case does not come within the principle of any of those cases which have been cited as entitling the hall to exemption,

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and I am therefore of opinion that the judgment of the learned Recorder should be reversed and the Appeal allowed.

BROWN, J. : I agree with the decision of Lord Justice Best for the reasons stated by him. In my opinion this particular Hall is not wholly dedicated to and used for public purposes. In paragraph 10 of his case stated, the learned Recorder finds that "Badminton "is played two nights a week. Play is not confined "to members of the Institute and the Badminton Club "is open to the public on payment of a separate "subscription." That is that on two nights a week people not connected with the Institute at all come and use the Hall, not for the purposes of the Institute. I think that that alone takes the case outside the exemption. Accordingly I hold that the appeal should be allowed and the question asked in the case stated be answered in the negative.

Solicitor for the appellant : *J. H. B. Gunning.*
Solicitors for the respondent : *Wm. O'Kane & Company.*

J. R.

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Valuation—Rates—Poor Rate—Exemption—Hereditament of a "Public Nature"—"Used for Public Purposes"—Sheep Dipping Station erected under the provisions of the Diseases of Animals Act, 1894 (57 & 58 *Vic., c.* 57)—*Sheep Dipping (Northern Ireland) Order*, 1932, *No.* 32, *Arts.* 7, 13, 17—*Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vic., c.* 56), *section* 63—*Valuation (Ireland) Act*, 1852 (15 & 16 *Vic., c.* 63), *section* 16—*Valuation (Ireland) Amendment Act*, 1854 (17 & 18 *Vic., c.* 8), *section* 2—*Valuation Acts Amendment Act (Northern Ireland)*, 1932 (21 & 22 *Geo.* 5, *c.* 26), *section* 3.

The respondents established a sheep dipping station under Article 16 of the Sheep Dipping (Northern Ireland) Order of 8th April, 1932, made under the provisions of the Diseases of Animals Act, 1894, which empowers a local authority with the approval of the Ministry of Agriculture to provide, fit up and maintain sheep dipping places. Under the said order sheep dipping is compulsory, and the hereditament was established as a dipping station to facilitate compliance with this duty, though it was not compulsory for persons owning or having charge of sheep to dip them in this particular place. The owners or persons in charge were responsible for the dipping of their own sheep under the supervision of an inspector employed by the respondents. A charge of one penny for each sheep dipped was made but the revenue produced by this charge was insufficient to meet the expenses of the station. Various articles of the said order made restrictions on the movement of sheep and the time when they might be dipped.

Held, reversing the decision of the Recorder of Londonderry, that the sheep dipping station was not a hereditament of a public nature and used for public purposes so as to be exempt from poor rate.

CASE STATED pursuant to the provisions of section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, by the County Court Judge and Chairman of Quarter Sessions for the County of Londonderry on the application of the Commissioner

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of Valuation for Northern Ireland, the said Commissioner being dissatisfied with the determination (hereinafter set forth) as being erroneous in point of law.

This case relates to an Appeal by the County Council of Londonderry (hereinafter called the appellants) against the entry made in the Valuation Lists in respect of a sheep pen and sheep dipping tank situate in Bannfield Road, Coleraine, County Londonderry, by the Commissioner of Valuation in the course of the General Revaluation directed by the Valuation Acts Amendment Act (Northern Ireland), 1932. This hereditament is wrongly described in the list as "cattle "pen and sheep dip," the rated occupier of the hereditament being given as Coleraine Borough Council owners in fee, and the hereditament described as cattle pen and sheep dip.

The Coleraine Borough Council own and occupy the cattle pen and the Londonderry County Council hold the sheep pen and sheeping dipping tank.

The appeal was heard on 30th January, 1936.

The arguments and judgment in this case were confined to the sheep pen and dipping tank and in no way relate to the cattle pen.

The hereditament in question is held by the Londonderry County Council from the Coleraine Borough Council as a tenancy from year to year subject to a rent of £4 per annum. It consists of a fenced-in space 83 feet by 75 feet, with a sheep dipping tank and a small office 6 feet by 7 feet for the Inspector.

The valuation of £10 placed upon the hereditament was not objected to, the ground of appeal being stated in the notice of appeal as follows:—"The premises "should be classed as exempt, being used for public "purposes and in pursuance of the statutory require-"ments of the Diseases of Animals Acts. They are "styled public sheep dipping stations."

The appellants are the local authority for the County of Londonderry for the purpose of the Diseases of Animals Act, 1894, and the orders made thereunder. Of these orders I was referred by the appellants, in particular, to the Sheep Dipping (Northern Ireland)

Order of 8th April, 1932. The hereditament was provided and equipped and is maintained by the appellants under paragraph 16 of this order which empowers a local authority, with the approval of the Ministry of Agriculture, to provide, fit up and maintain sheep dipping places.

Under the said Order sheep dipping is compulsory, and the hereditament was established as a dipping station to facilitate compliance with this duty though it is not compulsory for persons owning or having charge of sheep to dip them in this particular place.

The hereditament is used for dipping sheep under the said Act and Order. The owners or persons in charge are responsible for, and carry out the dipping of their own sheep under the supervision of an inspector employed by the appellants.

The appellants made a charge of one penny for each sheep dipped on the hereditament. The revenue produced by this charge is insufficient to meet the expenses of the station and the deficiency is borne by the County Council of Londonderry who are recouped as to fifty per cent. of such deficiency by the Ministry of Agriculture.

It was contended on behalf of the appellants that the object of the said Act and Order was to prevent the spread of disease among sheep ; that the hereditament was used for the furtherance of such object ; and that it therefore benefited the entire community and was used solely for a public purpose and should be exempt.

On behalf of the Commissioner of Valuation it was argued that the hereditament was provided only for the service of the appellants' county ; that it could not be used as of right by any member of the community ; and that it was not altogether of a public nature within the meaning of section 16 of 15 and 16 Vic., c. 63, and section 2 of 17 Vic., c. 8.

I held that the hereditament was altogether of a public nature and ordered that it be distinguished as such under section 2 of 17 Vic., c. 8.

The question for the Court is : Whether I was right in so holding ?

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Warnock, K.C., *MacDermott, K.C.*, and *Miller* for the Commissioner of Valuation :—

Section 63 of the Poor Relief (Ireland) Act, 1863, exempts from rating any hereditament dedicated to or used for public purposes. Section 16 of the Valuation (Ireland) Act, 1852, provides that " For the purpose of " such valuation, no hereditaments or tenements or " portions of the same, shall be deemed to be of a public " nature within the meaning of that Act unless such " hereditaments or tenements or portions of the same " respectively shall be altogether of a public nature."

The provision of the sheep dipping tank, under the Sheep Dipping (Northern Ireland) Order of 8th April, 1932, was not compulsory. It was permissive only, and the respondents are not bound to keep open this sheep dipping tank indefinitely. They maintain it at their own discretion.

It is not sufficient to shew that the object of an Act under which premises are used is an object which confers a benefit on the community as a whole. It must be shewn that each individual member of the public has an interest which the law will protect in the premises in question. No member of the public may use this tank as of right. By Article 17 of the said Sheep Dipping Order the local authority may require sheep to be dipped at such time and places as they may direct. By Article 13 the local authority may prohibit the movement of sheep at all ; and Article 7 gives the local authority the right to restrict the movement of sheep during six weeks of the dipping period.

In *Mayor, etc., of Limerick v. Commissioner of Valuation* (1), the Corporation of Limerick, having under the powers of their special Act purchased the Limerick Gas Works, manufactured and sold gas, and the surplus profits, after providing for certain charges, were applied, in pursuance of the provisions of the Special Act in reducing the town improvement rate. It was held that the gas works were not occupied for a " public purpose " and were not therefore exempt from being rated.

(1) I.R. 6 C.L. 426.

In *the Commissioner of Valuation v. Sligo Harbour Commissioners* (1), Holmes, L.J., referring to the decision in *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (2), said: "the "true ground of the judgment in that case was that a "bridge, open as of right to every member of the "public, on payment of a toll, which toll could only "be used for the benefit of the public in connection "with the bridge itself, and could never be the source "of private profit, was dedicated to, or used for public "purposes."

In *the Corporation of Cork v. The Commissioner of Valuation* (3), the Corporation of Cork had erected swimming-baths, which were maintained at the expense of the borough fund, and all receipts from them were paid into the borough fund. The expenditure exceeded the receipts. No member of the public could as of right use the baths, but any member of the public who complied with the bye-laws was permitted to use the baths no matter where he resided.

The Court of Appeal held that the baths were not a hereditament of a public nature and used for public purposes so as to be exempt from poor rate.

In *The Provost, etc., of Trinity College v. The Commissioner of Valuation* (4), the College provided university education and was open to all members of the public, subject to the payment of certain fees. The College was free from all external control, as regards its government, teaching and finance. It was held that the buildings of the College were not of a public nature or used exclusively for public purposes, and were not exempt from assessment as being of a public nature or used exclusively for public purposes and were not exempt from assessment under the Irish Rating and Valuation Code.

Chambers for the respondents :—

The respondents are the local authority for the County of Londonderry for the purposes of the Diseases

(1) [1899] 2 I.R. 214, 228.
(2) I.R. 2 C.L. 577.
(3) [1916) 2 I.R. 77.
(4) [1919] 2 I.R. 493.

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of Animals Act, 1894, and orders made thereunder, and the sheep dipping station was provided under Article 16 of the Sheep Dipping (Northern Ireland) Order of 8th April, 1932, made under the said Act. The sheep dipping station is part of the general machinery provided by the said Act designed for the protection of the sheep of the whole community.

The Act is not confined to the Londonderry County Council. It is available to every member of the public in the County of Londonderry. This is not the only sheep dipping tank provided for the purpose.

Tanks are provided in other counties and inspectors under the Act were appointed for the whole of Ireland.

This is the provision of a public service.

Under the said Order sheep dipping is compulsory and the station was provided to facilitate compliance with this duty. No profit is made. The revenue produced by the charge of one penny for each sheep dipped is insufficient to meet the expenses and one half of the deficiency is borne by the respondents.

[He referred to the *Corporation of Cork v. The Commissioner of Valuation* (1).]

Warnock, K.C. (in reply):—

In *the Corporation of Cork v. the Commissioner of Valuation* (1), O'Brien, L.C., said at page 103: "The "learned Recorder was fully aware of this provision "when he stated the very clear and satisfactory case "we have to deal with here. He states that under the "provisions of the statute all receipts from the use of "the baths must be paid into the borough fund. "He says: 'I was satisfied that the baths were the "'property of the appellants and in their occupation, "'and under their control; that the user of them was "'regulated by bye-laws made by the appellants and "'duly approved of and that no member of the public "'could as of right claim to use the baths. I was "further satisfied that any member of the public "'who desired to use the said baths, and who complied "'with the terms of the bye-laws, and in respect of

(1) [1916] 2 I.R. 77, 103-4.

" 'the paying bath, also paid the charge for using the " 'same, would be permitted to use the baths no " 'matter where he resided.' "

There is no such universality of right in this case. User of the sheep dipping pen is limited by the various restrictions set out in the Sheep Dipping (Northern Ireland) Order of 8th April, 1932.

This is a public service for the good of the community, but the user of the hereditament has the locality stamped upon it.

BEST, L.J. (delivered the judgment of the Court) :— BEST, L.J.

This matter comes before us by way of appeal from a decision of the learned Recorder of Londonderry. It is concerned with a sheep pen and sheep dipping tank situate in Bannfield Road, Coleraine, County Londonderry, belonging to the Coleraine Borough Council.

The Commissioner of Valuation in revaluing the hereditaments in Northern Ireland as directed by the Valuation Acts Amendment Act (Northern Ireland), 1932, placed a valuation of £10 on this particular hereditament. The appellants were dissatisfied and served notice of appeal.

They claimed that the pen should be exempt from rating as it is used solely for public purposes and in pursuance of the statutory requirements of the Diseases of Animals Acts and is styled a public sheep dipping station. They gave as the reasons why the valuation required alteration that the premises were an animal dispensary and maintained at the public expense; that no profit or gain accrues therefrom to the County Council, except in keeping down the disease of sheep scab as a benefit to the community as a whole. It was contended before the learned Recorder on behalf of the appellants that the object of the said Act and Order was to prevent the spread of disease among sheep; that the hereditament was used for the furtherance of such object; and that it, therefore, benefited the entire community and was used solely for public purposes and should be exempt. On behalf of the Commissioner

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of Valuation it was argued that the hereditament was provided only for the service of the appellants' county; that it could not be used as of right by any member of the community; and that it was not altogether of a public nature within the meaning of section 16 of the Valuation (Ireland) Act, 1852. The learned Recorder held that the hereditament was altogether of a public nature and ordered that it be distinguished as such under section 2 of the Valuation (Ireland) Act, 1854.

The Recorder stated a case on the application of the Commissioner of Valuation for Northern Ireland, finding the following facts:—The hereditament in question is held by the Londonderry County Council from the Coleraine Borough Council as a tenancy from year to year subject to a rent of £4 per annum. It consists of a fenced-in space 83 feet by 75 feet, with a sheep dipping tank and a small office 6 feet by 7 feet for the inspector. The valuation of £10 placed upon the hereditament was not objected to, the ground of appeal being as stated in the notice of appeal.

The appellants are the local authority for the County of Londonderry for the purposes of The Diseases of Animals Act, 1894, and the orders made thereunder. Of these orders 1 was referred by the appellants, in particular, to the Sheep Dipping (Northern Ireland) Order of 8th April, 1932. The hereditament was provided and equipped and is maintained by the appellants under paragraph 16 of this Order, which empowers a local authority, with the approval of the Ministry of Agriculture, to provide, fit up and maintain sheep dipping places. Under the said Order sheep dipping is compulsory and the hereditament was established as a dipping station to facilitate compliance with this duty though it is not compulsory for persons owning or having charge of sheep to dip them in this particular place.

The hereditament is used for dipping sheep under the said Act and Order. The owners or persons in charge are responsible for [illegible] carry out the dipping of their own sheep under the supervision of an inspector employed by the appellants. The appellants make a charge of one penny for each sheep dipped on the

hereditament. The revenue produced by this charge is insufficient to meet the expenses of the station and the deficiency is borne by the County Council of Londonderry who are recouped as to fifty per cent. of such deficiency by the Ministry of Agriculture.

That brings us to the consideration of section 63 of the Poor Relief (Ireland) Act, 1838, which exempts from rating any hereditament dedicated to or used for public purposes.

The question to be decided is whether as a matter of law these premises are exclusively dedicated and used for public purposes.

Mr. Warnock directed our attention to the case of *The Corporation of Cork v. The Commissioner of Valuation* (1), and referred us to the words of O'Brien, L.C. Baths were the hereditament in that case for which exemption was claimed and I think the learned Lord Chancellor put the matter in a nutshell when he said at page 103 that the material point of the finding of the learned Recorder of Cork in the case stated was that "no "member of the public could as of right claim to use "the baths." We think that those words are sufficient to decide this case.

No member of the public could as of right require to use this sheep dipping pen. Even the farmers of County Londonderry have no right to use this pen. Under Article 17 of the Sheep Dipping (Northern Ireland) Order of 1932, dated 8th April, 1932, so far from having a right to use the pen they may be prevented altogether from using it. How then can it be said that they can as of right demand that their sheep shall be dipped there? Further, under Article 13 a farmer may be served with an order which may prevent him moving his sheep from his farm until all his sheep have been double-dipped. Again, under Article 7, during six weeks of the dipping period, the movement of sheep may be forbidden.

Although this is a public service in one sense it is a public service that has to be administered locally. It cannot be said that every subject of His Majesty who owns sheep can resort to this particular dipping place

(1) [1916] 2 I.R. 77.

K.B.D. 1937.

THE COMMISSIONER OF VALUATION v. COUNTY COUNCIL OF LONDONDERRY.

BEST, L.J.

The user of this hereditament has, as Mr. Warnock said, locality and locality only stamped upon it and no general use can be made of it.

We therefore think that it is not a hereditament used exclusively for public purposes within the meaning of the statute. Accordingly, for these reasons we have come to the conclusion that the learned County Court Judge was not right in law in holding that the premises should be exempt and his decision must therefore be reversed and the appeal allowed.

Solicitor for the appellant: *J. H. B. Gunning.*
Solicitor for the respondents: *Lane & Boyle.*

J. R.

In re M. (1).

Ch. D. 1936.

Dec. 7.

Legitimation—Domicile—Person who had lived in that part of Ireland now Northern Ireland—Whether domiciled in Northern Ireland—Legitimacy Act (Northern Ireland), 1928 (18 & 19 Geo. 5, c. 5), section 1 (1).

Section 1 (1) of the Legitimacy Act (Northern Ireland), 1928, provides that "subject to the provisions of this section, where the "parents of an illegitimate person marry or have married one "another, whether before or after the commencement of this Act, "the marriage shall, if the father of the illegitimate person was or is "at the date of the marriage domiciled in Northern Ireland, render "that person, if living, legitimate from the commencement of this "Act, or from the date of the marriage, whichever last happens."

Plaintiff was born on 23rd March, 1890. Subsequently, on 14th March, 1907, her parents married one another. Plaintiff's father who had been born and had lived all his life in the County of Antrim, died on 26th February, 1915.

M., who was a sister of plaintiff's father, died on 17th February, 1936, intestate and unmarried The said M.'s next-of-kin consisted of the children of brothers and sisters who had predeceased her.

Held, that the words "domiciled in Northern Ireland" in the said section should be interpreted as "domiciled in that portion of "Ireland which is now Northern Ireland," and consequently that the plaintiff was entitled to take an interest in the estate of M.

Originating Summons for a declaration that the plaintiff was entitled to take an interest in the estate of M., who died intestate, as if the said plaintiff had been legitimate.

M. died on 17th February, 1936, intestate, without having been married. On 22nd May, 1936, letters of administration to her estate were granted to the defendant. The next-of-kin of the said M. were the descendants of her predeceased brothers and sisters. Plaintiff was the daughter of S. M., a brother of M., who had predeceased S. M., having died on 26th February, 1915. The plaintiff was born on 23rd March, 1890. The parents of the plaintiff subsequently married on 14th March, 1907. The said S. M.

(1) In the Chancery Division before Megaw, J.

Ch. D. 1936.

IN RE M.

was born and had lived all his life in the County of Antrim.

Murphy, K.C., and *Chambers* for the plaintiff :—

Section 1 (1) of the Legitimacy Act (Northern Ireland), 1928, provides that : " Subject to the pro- " visions of this section where the parents of an " illegitimate person marry or have married one " another, whether before or after the commencement " of this Act, the marriage shall, if the father of the " illegitimate person was, or is, at the date of the " marriage, domiciled in Northern Ireland, render " that person, if living, legitimate from the com- " mencement of this Act, or from the date of the " marriage, whichever last happens."

An illegitimate person whose father was at the date of marriage domiciled in Northern Ireland comes within the provisions of this section which is obviously intended to be retrospective.

" Domiciled in Northern Ireland " in the section should be read as domiciled in that part of Ireland which is now Northern Ireland.

Sheil for the administratrix :—

Domicile is based on intention. It could not have been the intention of plaintiff's father to be domiciled in Northern Ireland as he died before Northern Ireland as such was established. In *In re Egan* (1), Moore, L.C.J., said at page 161 : " Previous to the separation " of Ireland into two parts the petitioner's domicile " was Ireland, and not a particular part of it."

No reference is made in any section of the Act which indicates that the legislature contemplated a person being legitimated by virtue of its provisions before the establishment of Northern Ireland as such.

Murphy, K.C. (in reply) :—

The judgment of Moore, L.C.J., in *In re Egan* (1) is consistent with and supports the contention that a

(1) [1928] N.I. 159, 161.

person who had resided in that part of Ireland which is now Northern Ireland was domiciled in Northern Ireland.

MEGAW, J.

MEGAW, J.: This is a very interesting case. I cannot consider it as entirely free from difficulty. In passing remedial legislation of this nature it is to be regretted that the intention of the Act was not expressed in language that should leave such a question as the present open to controversy.

I am not at all sure that when Orders in Council were prepared for the establishment of two constitutions in Ireland under the Act of 1920 and the Acts of 1922, provision was not attempted for the settling of the domicile question, but no such order seems to be forthcoming.

So far as the question in this case is concerned domicile becomes relevant in its aspects in regard to the area of jurisdiction of the courts of law established under the above mentioned Acts. Each legislature has clearly power to legislate on a subject of this nature in the portion of Ireland within their jurisdiction.

There can be little doubt, I think, as to the intention of the legislature of Northern Ireland in enacting of the Legitimacy Act of 1928 which has been expressly made retrospective. It would be a *casus omissus* if a case like the present did not come within its provisions.

The Government of Ireland Act, 1920, as amended by the Acts of 1922, constituted two Courts of Judicature where there had been one before. These have each an independent jurisdiction over defined areas of the Ireland that was previously under one jurisdiction. The Courts in Northern Ireland have functioned without interruption since 1st October, 1921.

Mr. Sheil has relied on an ingenious argument that for one short period of a day Northern Ireland became merged in the Irish Free State and that on the 6th December, 1922, there was only one Irish domicile. In my opinion the various constitutional enactments on the subject expressly refute such a state of affairs. Even if no address had been presented to His Majesty

Ch. D. 1936.

IN RE M.

MEGAW, J.

under Clause 12 of the second Schedule to the Irish Free State Constitution Act, 1922, the Supreme Court of Judicature of Northern Ireland, as established by the Government of Ireland Act, 1920, would have continued to function, and consequently a separate domicile would have been attached to its jurisdiction.

The separation of the courts having created new domiciles it cannot be the result that the citizens of each of the newly organised communities should be without domicile. Domicile, as Mr. Sheil has stated, is based on intention where there is any ambiguity as regards residence. Continuous residence is a vital factor in determining domicile. In the present case the party concerned never resided anywhere outside the County of Antrim. No doubt during his lifetime he had an Irish domicile, but it was derived from a residence which would to-day have given him a domicile in Northern Ireland.

Section 1 (1) of the Act reads as follows:—

> "Subject to the provisions of this section, where "the parents of an illegitimate person marry or "have married one another, whether before or after "the commencement of this Act, the marriage shall, "if the father of the illegitimate person was, or is, "at the date of the marriage domiciled in Northern "Ireland, render that person, if living, legitimate "from the commencement of this Act, or from the "date of the marriage, whichever last happens."

The words "date of the marriage" are important as throwing some light on the interpretation of the section.

If Mr. Sheil's contention were correct these words would limit the operation of the Act to a marriage taking place after 1921 as there could be no Northern Ireland domicile before that date. Here the date of the marriage was 14th March, 1907, and the date of the death was 17th February, 1936.

On the whole I have come to the conclusion that "domiciled in Northern Ireland" in the section should be interpreted as domiciled in that portion of Ireland which is now Northern Ireland.

This, in my opinion, is consistent with and supported by the judgment of Moore, L.C.J., in *Egan v. Egan* (1). In that case the person whose domicile was under consideration had been born in the part of Ireland which afterwards became the Irish Free State and then came to Northern Ireland. His Lordship held that he could elect between the two domiciles and had elected to be domiciled in Northern Ireland. It follows, I think, that when a person has lived all his lifetime in an area which is now part of Northern Ireland the ordinary presumption of law arising from continuous residence should be applicable, and that when a division of domicile was effected by the legislature he must be held to be domiciled in the part of the divided territory in which he had so resided.

Solicitor for the plaintiff: *James L. Russell.*
Solicitors for the defendant: *Wm. Harper & Co.*

J. R.

(1) [1928] N.I. 159.

K.B.D. (Prob.). 1937.

Jan. 22.

IN THE GOODS OF ANNA GILLILAND, DECEASED (1).

Will destroyed but not revoked—Wills Act, 1837 (1 *Vict.*, *c.* 26), *section* 20—*No evidence of contents—Form of order on grant of administration.*

A will had been destroyed by direction of the testatrix but not in her presence. She died without making another will. No copy of the will was forthcoming and no evidence of its contents was available.

On an application by one of her next-of-kin for letters of administration to her estate, the applicant undertook to bring proceedings to administer the estate in the Chancery Division and the Court thereupon granted administration "until the will of the "deceased or an authentic copy of it should be brought into the "Registry."

ANNA GILLILAND, a widow who lived in Belfast, was a client of Messrs. George McIldowie & Sons, solicitors. On 9th January, 1928, William McIldowie, a member of the firm, made a will for her which was put in an envelope endorsed "531. Last Will of "Anna Gilliland, 89 Malone Avenue, Belfast. New "Will made 9th January, 1928. Exor. Wm. "McIldowie."

This endorsement was in William McIldowie's handwriting. Mrs. Gilliland went to Norwood, Ohio, U.S.A., where she lived with Mrs. Myrtle Davis. Mrs. Davis was a niece of Mrs. Gilliland's husband, and had until her marriage been treated by Mrs. Gilliland as an adopted daughter.

William McIldowie died 30th September, 1929. In July, 1932, John McIldowie, who succeeded to the practice, received the following letter :—

"July 8th, 1932,

"5431 Hunter Avenue,

"To Mr. McIldowie. "Norwood, Ohio.

"Dear Sir,

"I want you to destroy a will I made, a will I "made some years ago in your office. I have good

(1) In the King's Bench Division (Probate) before Andrews, L.J.

"reasons for doing so. I understand it is not "legal to make a will here to be acted on in Great "Britain.

"I intend to sail for Belfast in August next if all "goes well with me. My health is much improved. "Will be very glad to return. Enclosed you will "find vouchers for collecting Income Tax. Do not "send me the money as I will wait till I go over, to "save the exchange.

"Hoping you are all well.

"I am yours respectfully,

"ANNA GILLILAND."

On receipt of this letter John McIldowie destroyed the will without reading it, entered in the firm's register of wills "Destroyed per instructions 8/7/32" and wrote to Mrs. Gilliland a letter in the course of which he said: "with regard to the will there is no "reason why you should not make a will in the United "States. All that is necessary is that you should sign "your name at the end of it in the presence of two "witnesses who sign their names in the presence of "yourself and also in the presence of each other."

Mrs. Gilliland died on 14th October, 1936, without having returned to Ireland and without making a new will. She left no children but left real and personal property in Northern Ireland. Samuel Browne claiming to be one of the next-of-kin, applied for letters of administration.

An affidavit of John McIldowie stated that no instructions nor copy of the will could be found and that no clerk in his office knew anything of its contents.

Robb, K.C. (with him *Condy*) for the applicant:—

Although the will was destroyed, it was not revoked. Destruction by an agent only effects revocation when the destruction takes place in the testator's presence (section 20 of the Wills Act, 1837).

The only evidence of its execution is the envelope endorsement by Mr. William McIldowie, its entry in the firm's register of wills and the reference in Mrs. Gilliland's letter. There is no evidence of its contents.

K.B.D. (Prob.). 1937.

IN THE GOODS OF ANNA GILLILAND, DECEASED.

The applicant is a cousin of deceased and claims to be one of the next-of-kin, but does not know who may be deceased's heir. An inquiry to ascertain the next-of-kin and the heir at law will be necessary in any event, and the applicant is willing to undertake to administer through the Court.

We suggest there is sufficient evidence of due execution and that the order should be in the form used in *Goods of Johnson* (1).

ANDREWS, L.J.

ANDREWS, L.J.: In my opinion there is sufficient evidence that the will of 9th January, 1928, was duly executed, and as its destruction did not take place in the presence of the testatrix it has not been in law revoked (The Wills Act, 1837, section 20). There seems, however, on the evidence before me, to be no prospect whatever of its contents ever being proved, and in these circumstances the administration of the estate cannot be deferred indefinitely.

The applicant is willing and has undertaken by his counsel to administer through the Court; and in consequence of this undertaking I do not consider it necessary that notice of this application should be served upon any other interested party. I shall make an order in the form used in the *Goods of Johnson* (1), reading the undertaking upon the order, and directing that administration be granted to the applicant, limited until the will or an authentic copy of it shall be brought into the Registry.

Solicitors for the applicant: *George McIldowie & Sons.*

J. McC.

(1) 11 Jur. N. S. 184.

LINEN INDUSTRY RESEARCH ASSOCIATION AND COMMISSIONERS OF INLAND REVENUE (1).

K.B.D. 1937.

Jan. 26. Feb. 5.

Revenue—Income Tax—Association existing for the purpose of carrying on research in the linen industry—Whether entitled to exemption granted to charities—Appeal from decision of Special Commissioners refusing exemption—Jurisdiction of Recorder to hear appeal—"Exemption"—The Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sections* 37, 40, 195, 196, 202—*The Finance Act*, 1921 (11 & 12 *Geo.* 5, *c.* 32), *section* 30—*The Finance Act*, 1925, (15 & 16 *Geo.* 5, *c.* 36), *section* 19—*Marginal Note.*

The appellants applied to the Commissioners of Inland Revenue under section 37 of the Income Tax Act, 1918, for exemption from income tax in respect of the financial year ending 5th April, 1934, on the ground that the Association was established for charitable purposes only.

The Commissioners refused the claim and the appellants appealed to the Special Commissioners who also refused the claim. The Special Commissioners found as a fact that in the main the objects of the Association were to benefit the Linen industry and that the Association was not established for charitable purposes alone.

The appellants required the Special Commissioners to list an appeal before the Recorder; this the Special Commissioners refused to do on the grounds that the Recorder had no jurisdiction to hear the appeal under section 37 of the Income Tax Act, 1918, determined by them under section 19 of the Finance Act, 1925.

The appellants then requested the Deputy Recorder to list the appeal and the Deputy Recorder provisionally listed it for argument on the preliminary question as to whether or not he had jurisdiction to hear it.

The Deputy Recorder held that he had jurisdiction.

The Commissioners of Inland Revenue then obtained a conditional order of prohibition, forbidding the Deputy Recorder to hear the appeal, and the case then came before the King's Bench Division on motion to make the conditional order absolute.

Held, by the King's Bench Division (Best, L.J., and Brown, J.), that the Deputy Recorder was wrong in holding that he had jurisdiction to hear the appeal from the decision of the Special Commissioners refusing exemption to the Association from income tax

(1) In the King's Bench Division before Best, L.J., and Brown, J.

K.B.D. 1937.

LINEN INDUSTRY RESEARCH ASSOCIATION AND COMMISSIONERS OF INLAND REVENUE.

under the provisions of section 37 of the Income Tax Act, 1918, and that the provisions of section 202 of that Act do not enable an appeal by re-hearing to be made to the Deputy Recorder.

The conditional order was therefore made absolute.

MOTION to make absolute a conditional order of prohibition directed to the Deputy Recorder of Belfast forbidding him to hear an appeal from the decision of the Special Commissioners refusing an application for exemption from income tax.

The appellants, the Linen Industry Research Association, a company limited by guarantee and having its registered office at Research Institute, Lambeg, Co. Antrim, claimed exemption from income tax on the ground that it was established for charitable purposes only within the meaning of section 37 of the Income Tax Act, 1918.

On 6th March, 1935, the Association's accountants delivered to the Commissioners of Inland Revenue a form of application for exemption from income tax in respect of the financial year ending 5th April, 1934, signed by the Secretary of the Association and claiming full exemption on charitable grounds.

On 1st April, 1935, the Secretary to the Board of Inland Revenue wrote to the Association's accountants stating that the Board were unable to admit the claim for exemption for that year under section 37 of the Income Tax Act, 1918, and drawing their attention to their rights to have the claim heard and determined by the Special Commissioners under the provisions of section 19 (3) of the Finance Act, 1925.

The appellants claiming to be aggrieved by the decision of the Board of Inland Revenue made application to have the claim for exemption heard and determined by the Special Commissioners under the provisions of section 19 (3) of the Finance Act, 1925.

The Special Commissioners sitting in Belfast heard the claim for exemption on 20th November, 1935, and having heard the evidence regarding the Association's Constitution and activities stated that they found as a fact that in the main the objects of the Association were to benefit the Linen Industry, and that the

Association was not established for charitable purposes only. They therefore disallowed the claim.

The Association's accountants then addressed letters to the Special Commissioners and to the Chief Inspector of Taxes requiring a re-hearing by the Recorder of Belfast of the claim.

The solicitor of Inland Revenue wrote to the accountants on 13th December, 1935, stating that the Recorder had no jurisdiction to re-hear a claim under section 37 of the Income Tax Act, 1918, determined by the Special Commissioners under section 19 of the Finance Act, 1925.

The appellants subsequently required the Special Commissioners to list the case for hearing before the Recorder of Belfast, which the Commissioners refused to do.

The appellants then applied to the Deputy Recorder of Belfast to list the case. He stated that he would provisionally list the case for a day to be mutually agreed on for argument on the preliminary question of whether he had jurisdiction to re-hear the claim. Such hearing took place before him on 21st April, 1936, in the presence of counsel for the Commissioners of Inland Revenue and for the appellants.

The Deputy Recorder gave judgment declaring that he had jurisdiction to hear the appeal.

In giving judgment the Deputy Recorder said : " An " appeal does not lie unless expressly given by statute, " and in my opinion an appeal expressly given by " statute can be taken away only expressly by statute " and section 19 of the Finance Act, 1925, does not " take away the right of appeal given by section 202 " of the 1918 Act.

" The appeal in cases of exemption is quite different " from the appeal in cases of repayment of tax. The " distinction is recognised by the learned Attorney- " General in his argument in the case of *The Com-* " *missioners of Inland Revenue, In re Sir Samuel* " *Kelly* (1). In his argument he states : ' the repay- " ' ment mentioned is quite different from an assess- " ' ment. We submit that there is no appeal in respect

(1) [1935] N.I. 162.

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" ' of a repayment. Section 202 of the Income Tax
" ' Act, 1918, makes it quite clear that there is a
" ' distinction between exemption and repayment of
" ' tax. In cases of assessment an appeal by way of
" ' re-hearing lies to the Recorder, but claims for
" ' repayment of tax are made to and finally determined
" ' by the Special Commissioners,' and Mr. Justice
" Brown, in delivering the judgment of the Court in
" that case, says : ' section 202 of the Act of 1918 has
" ' not been repealed. In that section appeals by way
" ' of re-hearing are expressly given to exemptions.' "
" In my opinion therefore I have jurisdiction to
" hear this appeal and so decide."

Following upon this judgment, the Commissioners of Inland Revenue applied that a conditional order of prohibition should be directed to the Deputy Recorder forbidding him to hear such appeal. Such conditional order was granted and the case came before the King's Bench Division on application by the Commissioners of Inland Revenue that the order might be made absolute.

The Attorney-General (*A. B. Babington, K.C.*), *J. C. Davision, K.C.* (with them *J. Gerald Dougherty*), for the Commissioners of Inland Revenue :—

The Finance Act, 1925, was a codifying Act, and certain pre-existing rights which were given to charities in respect of income tax were incorporated in it. We contend that there was formed a sort of compartment of the Income Tax code which was different from the rest of the code. It is under section 19 of this Act that the question which the Court has to decide primarily arises.

The right of appeal is given by section 19 (3) of this Act of 1925. We submit that when this sub-section says that to that right of appeal the principles of the Income Tax Acts are to apply, that is the only appeal that is imported, and the other right of appeal which applies to ordinary assessments under section 196 of the Income Tax Act, 1918, is not imported. It would be absurd to have a further right of appeal

imported by these words which are only words relating to the appeal to the Special Commissioners. Section 196 of the Income Tax Act, 1918, only deals with assessments, and the only person who can re-hear an assessment is the Recorder or County Court Judge having jurisdiction in the place where the assessment was made. In the present case the assessment was not made in the local jurisdiction, it was made in the Commissioners' headquarters in London.

We rely on Commissioners of Inland Revenue, *In re Sir Samuel Kelly* (1). In that case the Court was of opinion that the words in section 19 (3) of the Finance Act, 1925, do not include an appeal by re-hearing to the Recorder or County Court Judge because an appeal by re-hearing is an appeal from the Special Commissioners to a different tribunal. The Special Commissioners under this section are an appeal tribunal themselves. It would be an anomaly to say that incorporated in that right of appeal was another right of appeal which ousted jurisdiction altogether. We submit that in so far as it may be argued that section 19 (3) of the Finance Act, 1925, directly incorporates the right of appeal to the Recorder, the case of Sir Samuel Kelly (1) is a direct authority to the contrary. We contend that that decision is sound in principle.

It was argued on behalf of the appellants before the Deputy Recorder that exemptions are by section 202 of the Income Tax Act, 1918, expressly made liable to the same right of appeal by way of re-hearing as if they were assessments and therefore that section gives a direct appeal in the present case.

We submit, however, that the exemption mentioned in section 202 of the Act of 1918 is not the exemption mentioned in section 37 of the same Act. The exemption mentioned in section 202 is the ordinary case of exemption of a man who has only got £100 a year and who is exempt. That exemption does not apply to the case of indiscriminate exemption or relief under section 37 which arises in quite a different way. It does not arise upon an assessment. It was always a

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repayment or relief as distinct from exemption. If it is relief and not exemption that is referred to in section 202, then there is no right of appeal by that section. The exemption referred to in section 37 is relief although called exemption. In substance this is a claim for repayment. Section 202 gives no right of appeal in the case of repayment of tax, although in the case of exemptions it gives an appeal by way of re-hearing.

On this point on the construction of the word exemption, on the contrast between the use of that word in section 37 and section 202, we rely on the principle which has been laid down in several cases that where there is any difficulty as to construction the Court is entitled to look at the Income Tax Act, as a whole. That principle was referred to by Atkin. L.J., in *Martin v. Lowry* (*H.M. Inspector of Taxes*) (1)

Another statement of the law was made by the same Judge, then become Lord Atkin, in *Salisbury House Estate, Ltd. v. Fry* (*H.M. Inspector of Taxes*) (2).

We rely on *Special Commissioners of Income Tax v. Pemsel* (3), as showing that the Special Commissioners had a special jurisdiction.

We also rely on *Overseers of the Poor for the Township of Garston v. Carlisle Surveyor of Taxes* (4), as showing that it has always been recognised that there is really no machinery by way of appeal in these cases of relief to charities and that the case cannot come within section 202 of the Income Tax Act, 1918.

We submit that when section 37 is read in conjunction with section 202 there is clearly an ambiguity as to the sense in which the word exemption is used in section 202. Once there is an ambiguity it is necessary to find out under which of the various denominations set out in section 202 this particular case falls. That is to say, whether it is an exemption, a relief, or a case of repayment. The essential words ought really to be "relief shall be granted." There being an ambiguity in the two sections it is necessary to examine the way in which this matter arose historically. Then the historical argument is checked by

(1) 11 Tax Cases 297, 317.
(2) 15 Tax Cases, 305, 320.
(3) 3 Tax Cases, 53.
(4) 6 Tax Cases, 659.

the practice followed, for such claims have always been made to London and not to the district officers.

When all these matters are taken into consideration we submit it becomes clear that this is a case of repayment and not of exemption.

The words of section 19 (3) of the Finance Act, 1925, cannot import into this right of appeal from the Special Commissioners to the High Court by way of case stated, another right of appeal.

We submit that the Deputy Recorder was wrong in holding that he had jurisdiction to hear this appeal.

Hume, K.C. (with him *J. D. Chambers*) for The Linen Industry Research Association :—

We submit that this appeal lies by virtue of section 202 of the Income Tax Act, 1918. The case of *Commissioners of Inland Revenue In re Sir Samuel Kelly* (1), does not cover the present case at all. The question of exemption was not considered in that case. The whole question really comes down to this, does the word "exemption" mean "exemption"? The Attorney-General says "exemption" does not mean "exemption." We submit that it does.

If section 202 of the Income Tax Act, 1918, stood alone, the claims to exemption, abatement, and relief given there would be sufficient to include all forms of exemption. It is perfectly clear from section 37 of the Income Tax Act, 1918, that charities are getting exemption. It is true that section 37 is headed "Relief to charities," but, undoubtedly, when you get exemption you get relief. The marginal note to section 37 says: "Exemption in respect of rents of "lands belonging to hospitals and other charities." When the word "exemption" is used, it is deliberately and rightly used. If the word "exemption" in section 202 covers charitable exemptions, we submit there is clearly this right of appeal.

It has been suggested that because there was a limitation in the Act of 1853 on the question of exemption, that limitation must be imported into section 202. We submit that is not so. That would

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be making a new Act of Parliament, and would almost come within the mischief referred to by Lord Herschell in *Bank of England v. Vagliano Brothers* (1). We submit that where the wording of a new Act differs from the wording of an older Act, it is a presumption that the legislature intended to change the meaning, see *Lawrence v. King* (2). Here, there were words of an earlier statute setting out claims for exemption by reason of a person's income being under £100. In the later statute these words were left out leaving simply the words "claims for exemption subject to a "like appeal." These words are left out and the result is that claims for exemption are not confined in the limited way they were confined by section 31 of the Act of 1853.

We rely on the statement of the law in *Craies on Statute Law* (third edition), page 130.

The marginal note in section 202 of the Act of 1918 reads: "All claims for exemption." and although not a determining factor in construing the statute such a note is a matter that can very well be looked at.

At no time did we claim repayment.

We submit that it would be making new law to import into section 202 words limiting the meaning of the word "exemption." That being so, and exemption meaning exemption, the relief a charity gets, being relief by exemption, we contend that the Deputy Recorder was right in holding that he had jurisdiction to hear the appeal, and that the application should be dismissed.

The Attorney-General (in reply):—

What was dealt with in the case of charities was something that never came within the local purview at all, it went straight to London. When section 31 of the Act of 1853 says: "provided that there shall be "a like appeal as regards claims for exemptions in "Ireland to the Assistant Barrister, Chairman, or "Recorder," it never was intended that this claim for repayment made to the Commissioners in London, and not adjudicated upon locally, should be subject

(1) [1891] A.C. 107, 144. (2) 37 L.J.M.C. 78.

to such an appeal unless it can be found in the four corners of the Act of 1918. When section 37 is read together with section 202, it is found there is necessarily an ambiguity because the two words "relief" and "exemption" are used. We submit that the present case comes within that portion of section 202 which deals with claims for repayment of duty and not within that portion which deals with exemptions.

It is impossible to read section 37 and section 202 in the same sense.

We submit that if this claim was not an exemption within section 31 of the Act of 1853, it would not be an exemption within section 202 of the Act of 1918.

If Mr. Hume's argument is correct, the words in section 19 of the Finance Act, 1925, were absolutely unnecessary, because that section says that all the provisions of the Income Tax Acts providing for appeal shall apply accordingly with any necessary modifications.

If this was exemption within the meaning of the word exemption in section 202, it was quite unnecessary to put in that section to give this right of appeal, because the parties already had it under section 202. The reason why it was put in was because the Legislature in 1925 thought there was no right of appeal and thought they were dealing with a case of repayment. Therefore they gave a limited appeal by way of case stated. This is a case not of exemption but of repayment. It was only in respect of exemption given in 1853, by reason of the income of a person being under £100 a year, that there was any right of appeal given. We submit that that right of appeal, which is carried into section 202 of the Act of 1918, was never intended to and does not in fact convert what is really a repayment into an exemption, in order to make it appealable under the word "exemption" in section 202. The whole framework of the statutes shows that, and when section 19 of the Act of 1925 is read by itself, it becomes clear that the legislature never thought that there was an appeal *aliunde* than under that section, and an appeal which might, and would in the present case, oust the jurisdiction of the Special Commissioners

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altogether, because it would mean a re-hearing to the Recorder on a question of fact, instead of allowing the appeal which is set out in section 19, to take effect. It is impossible to think that the Legislature intended that section 19 of the Act of 1925 should be abandoned. That section was regarded as providing a new appeal in respect of a matter which was not subject to appeal previously. That appeal was to a new tribunal, the Special Commissioners, and afterwards to the High Court.

We submit that the Deputy Recorder was wrong in holding that he had jurisdiction and that the Court should decide that there is no right of appeal to the Recorder, but that the only right of appeal in respect of a charity is a right of appeal from the Special Commissioners to this Court by way of case stated.

BEST, L.J.: This is a case of some importance, and we will reserve judgment.

BEST, L.J.

Feb. 5.

BEST, L.J.: This matter comes before the Court on the application of the Commissioners of Inland Revenue that the conditional order made therein on the 31st day of July, 1936, be made absolute, notwithstanding cause shown and that they should have the costs of the application.

The facts of the case and the arguments addressed to the learned Deputy Recorder (Marcus D. Begley, Esq., K.C.), together with his decision thereon are set out in Exhibit "A" to the Affidavit of Mr. F. C. MacNeice, Solicitor to the Ministry of Finance for Northern Ireland filed in this matter on the 27th day of July, 1936.

The question which we have to decide is whether the Deputy Recorder was right in holding that he had jurisdiction to hear an appeal by the Linen Industry Research Association from the decision of the Special Commissioners refusing exemption to the Association from income tax under the provisions of section 37 of the Income Tax Act, 1918.

On the one hand it is submitted on behalf of the Commissioners of Inland Revenue that there is no

appeal from the decision of the Special Commissioners disallowing their claim for exemption and on the other hand the Association maintains that an appeal lies from the determination by the Special Commissioners to the Recorder or County Court Judge within whose jurisdiction the registered office and place of business of the Association are situate.

The question turns on the construction to be placed on sections 37, 40, 195, 196 and 202 of the Income Tax Act, 1918, on section 30 of the Finance Act, 1921, and on section 19 of the Finance Act, 1925. The claim of the Association is that it is entitled to the exemption granted to Charities, Friendly Societies, etc., by section 37 of the Act of 1918, and that as this claim has been disallowed by the Special Commissioners it is entitled to have the case re-heard by the Deputy Recorder, being the Judge who has jurisdiction in the matter, under the provisions of section 202 of the Act of 1918. This section which is applicable to Northern Ireland provides that claims of exemption, etc., shall be made in such manner and form as the Commissioners of Inland Revenue may prescribe, and shall be made to and finally determined by the Special Commissioners, subject, as regards claims for exemptions, to the like appeal by way of re-hearing as in the case of assessments. The words "subject, as regards claims for "exemptions, to the like appeal by way of re-hearing "as in the case of assessments," are rightly regarded by Mr. Hume, for the Association, as the sheet anchor of his case. He says, that exemption means exemption and nothing else, and that as section 37 (1) of the Act of 1918 begins by providing: "Exemption shall be "granted . . ." these words import into this section the provisions of section 202 of the same Act which give rise to the like appeal by way of re-hearing, i.e., re-hearing by the County Court Judge or Recorder as in the case of assessments.

The answer of the Attorney-General for the Commissioners is, as I understand it, two-fold. In the first place he submits that the term "exemption" has at least two meanings: (1) entire freedom from tax such as was given to an individual under section 10

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of the Act of 1918, i.e., where the income of the individual does not exceed £130, the claimant shall be entitled to exemption from income tax, and (2) freedom where the individual whether a person or charity or body of any description is *prima facie* liable to be taxed but is allowed relief by way of repayment on satisfying the Special Commissioners that such relief must be granted in accordance with the provisions of the Income Tax Act, 1918, or with the provisions of any of the subsequent Finance Acts.

The Attorney-General would, I think, admit that, for example, if a trader or shopkeeper in a small way of business were to fail to convince the Special Commissioners that his income was within the limits of complete exemption from payment of income tax, such trader or shopkeeper would be entitled in Northern Ireland to an appeal against the determination of the Special Commissioners to the Recorder or County Court Judge having jurisdiction in the matter. But he submits that the case is quite different where there is a *prima facie* liability to pay tax and where relief or exemption can only be obtained by making application for repayment of tax which actually has been paid or for which, if the relief or exemption be not granted, the liability to pay is not discharged. This brings us back to the meaning of the word "exemption" in section 37 of the Act of 1918.

Sections 37, 38 and 39 all deal with exemptions. In each case the side note begins with the word "ex-" "emption" but although this is the case, yet if we look at section 40 which contains the machinery by which effect is to be given to sections 37, 38 and 39 we find that the side note is "provisions as to claiming "repayments." Now the side note is not part of the Act of Parliament but for the purpose of interpretation it was used by Baron Martin in *Nicholson v. Fields* (1), and by Collins, M.R., in *Bushell v. Hammond* (2), where the latter learned Judge is reported as having said that the side note, although it forms no part of the section, is of some assistance inasmuch as it shows the drift of the section. The drift then of section 40 is

(1) 31 L.J. Ex. 233. (2) 73 L.J.K.B. 1005.

that sections 37, 38 and 39 are concerned with claims for repayment but the matter is not left merely to drift, for section 40, sub-section (3), provides that where the Special Commissioners allow a claim under section 37, 38 or 39 they shall issue an order for repayment.

From a consideration of these sections I arrive at the conclusion that although the claim to be made under section 37 is called a claim for exemption it is in reality a claim for repayment of tax for the payment of which there is already a liability. This conclusion is, I think, borne out if we examine closely the claim made by the Association in the present case and read it along side the provisions of section 37 (1) (*a*) of the Act of 1918.

Item No. 1 in the claim is Sundry Schedule A. Valuations £233. On turning to section 37 (1) (*a*), we find that although exemption shall be granted under Schedule A in respect of the rents and profits of any lands, etc., belonging to any hospital, etc., yet it is provided that any assessment upon the respective properties shall not be vacated or altered, but shall be in force and levied, notwithstanding the allowance of any such exemption, so that even if the Association were admittedly a Charity it would still be liable in law, though not perhaps in practice, to have income tax under Schedule A levied, and could only in law recover it by the process of repayment.

Section 202 of the Act of 1918 gives no appeal by way of re-hearing to the Recorder or County Court Judge in cases where claims for re-payment are made. This was the decision of the Court of King's Bench in the case of *The Commissioners of Inland Revenue, In re Sir Samuel Kelly* (1), and I, sitting for the time being as a Judge of the King's Bench Division, am not at liberty to disregard that decision. In saying this I do not mean that as at present advised I have any doubt as to its correctness.

Similar considerations to those just mentioned in connection with Schedule A would, I think, apply to the other items in the Association's claim, viz.: the

(1) [1935] N.I. 162.

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tax under Schedule B which is dealt with under section 30 (1) (*b*) of the Finance Act, 1921, and the War Loan Interest. If the tax on the latter instead of not being deductible at source had been so deducted, in what way other than by repayment could the Association have become entitled to exemption?

The second branch of the Attorney-General's argument was that just as sections 37 and 40 of the Act of 1918 granted relief and prescribed the mode or machinery by which that relief was to be obtained, so section 19 of the Finance Act, 1925, created new machinery but did not make any alteration in the right to relief granted to the subject, and whilst granting him an appeal from the Commissioners of Inland Revenue to the Special Commissioners did not grant a further appeal by way of re-hearing to the Recorder or County Court Judge.

It is, of course, true that by sub-section (4) of section 19 of the Act of 1925 the provisions of section 40 of the Act of 1918 shall no longer apply to claims for exemption under section 37 of the same Act but, in my opinion, this provision in sub-section (4) of section 19 of the Act of 1925 in no way alters the nature of the relief to be granted under section 37 of the Act of 1918 but is merely consequential on the change of procedure introduced in section 19 of the Act of 1925.

According to the provisions of the Act of 1918, any claim under section 37 of that Act was by section 40 thereof to be made to the Special Commissioners in writing, but by section 19 of the Finance Act, 1925, a claim for exemption from income tax under the provisions of section 37 of the Income Tax Act, 1918, is in the first instance to be made to the Commissioners of Inland Revenue, and any person aggrieved by the decision of the said Commissioners on a claim made by him may appeal to the Special Commissioners. This appeal is to be heard by the Special Commissioners in like manner as an appeal made to them against an assessment under Schedule D and all the provisions of the Income Tax Acts relating to such an appeal (including the provisions relating to the statement of a case for the opinion of the High Court on a question

of law) shall apply accordingly with any necessary modifications.

Whether this alteration in the mode of dealing with claims for exemption in respect of income of charities was made merely for departmental or administrative purposes so as not to burden the Special Commissioners with hearing cases of a non-contentious character I know not but in the result the subject is now entitled to two hearings of his claim instead of one, with the right in certain circumstances to the statement of a case for the opinion of the High Court on a question of law. I can find nothing in this section which coerces me to hold that an appeal *from* the Special Commissioners by way of re-hearing to the Recorder or County Court Judge has been granted to the subject.

For all these reasons I am of opinion that the learned Deputy Recorder was wrong in holding that he has jurisdiction to hear an appeal in this case and I think that the conditional order of prohibition should, notwithstanding the cause shown, be made absolute with costs to be paid by the Association.

Solicitor for the Commissioners of Inland Revenue : *F. C. MacNeice.*

Solicitor for the Linen Industry Research Association : *Robert Wallace.*

J. McC.

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Nov. 11, 12.

McLAUGHLIN & COSGROVE v. COMMISSIONER OF VALUATION FOR NORTHERN IRELAND (1).

Valuation Acts—Rating—Exemption—Premises used exclusively for charitable purposes—Members of Religious Community living in Convent and engaged in religious, educational and charitable work outside convent—Poor Relief (Ireland) Act, 1876 (1 *&* 2 *Vict., c.* 56), *section* 63—*Valuation (Ireland)) Act*, 1852 (15 *&* 16 *Vict., c.* 63), *section* 16.

A convent was erected by the Roman Catholic inhabitants of the parish of C., and from 6th November, 1890, the members of the Religious Order known as the Sisters of Mercy had been in occupation and had been performing their duties for the benefit of the poor of the Parish.

The buildings had always been exempt from rating, as also was the public elementary school attached to the convent. The community numbered sixteen ; of these thirteen were engaged in working for the poor, teaching the Catechism and instructing girls over school age, and teaching in the public elementary school. The remaining three were engaged in domestic work. The members of the community also superintended the work of the Sacristan in the Roman Catholic Church.

The Chapel in the Convent was normally used only by the members of the community, but was not restricted solely for their use as members of the public occasionally attended.

The work done by the members of the community was mainly outside the convent.

The premises were valued by the Commissioner of Valuation at £112 10*s.* 0*d.*

The appellants appealed to the Acting County Court Judge of T. They asked in their notice of appeal that the convent should be distinguished in the valuation list as being used for charitable purposes and should be exempt.

The County Court Judge confirmed the valuation but held that the premises being used exclusively for charitable purposes should be distinguished by the Commissioner of Valuation in pursuance of section 2 of the Valuation (Ireland) Act, 1854, and should be exempt. He, however, stated a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the premises were not used exclusively for charitable purposes, and were therefore not exempt.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

CASE STATED by the Acting County Court Judge and Chairman of Quarter Sessions for County Tyrone, pursuant to the provisions of section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860.

The material facts as appearing from the case were as follows :—

The premises in this case were the Convent of the Sisters of Mercy at Cookstown.

I refer to a copy of the relevant entry in the Valuation List and to a copy of the notice of appeal.

The premises have the following accommodation :—

Ground Floor : two rooms, refectory, three pantries, kitchen, laundry, scullery, store and furnace room.

First Floor : room, chapel, sacristy, hall, bath and W.C.

Second Floor : eleven bedrooms, bath and two W.C.'s.

St. Brigid's Convent, Cookstown, the subject of said appeal, was erected by the Roman Catholic inhabitants of the Parish of Cookstown, and on 6th November, 1890, the Sisters of Mercy went into occupation to perform the duties hereinafter enumerated for the benefit of the poor of said Parish.

The members of the Community belong to the Religious Order known as the Sisters of Mercy. The following are among the rules and constitution of said Order :—

I.

All Religious Orders have one common end, the greater Glory of God and their own perfection. This end is attained in Sisters of Mercy by fidelity to rule. Besides the Spiritual duties there are duties of the Institute as they are called.

II.

Objects of the Institute named the Sisters of Mercy :—

(*a*) Education of poor girls.

(*b*) Visitation of the sick.

(*c*) Protection of distressed women of good character.

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These are the three objects peculiarly characteristic of the Institute. These three objects are not intended to exclude other services to the poor but are to have precedence of all others.

III.

Other objects in conformity with Rule of the Institute are :—

(*a*) Care or visitation of hospitals, Magdalen Asylums.
(*b*) Visitation of workhouses.
(*c*) Instruction of adults.
(*d*) Distribution of food and clothing to poor.
(*e*) Holding Sunday School and Night School, etc.

The Community numbers 16. Of these, 13 are engaged in working for the poor, teaching catechism and instructing girls over school age and teaching in St. Brigid's P. E. School. The remaining three are engaged in domestic work. The members of the Community also superintend the sacristan's work in Holy Trinity Church, Cookstown.

The income of the community is derived solely from the following sources :—

(*a*) Charitable donations and bequests.
(*b*) Some small investments.
(*c*) Capitation grant from the Ministry of Education in connection with the P. E. School.

No part of the income can be or is directed to non-charitable purposes and after the support of the Community and the necessary upkeep of the buildings the remainder is expended in charity. The accounts are audited on behalf of the Trustees by the Cardinal Archbishop of Armagh.

The Chapel in the Convent is normally used only by the members of the Community but is not restricted solely for their use as members of the public occasionally attend. It is recognised by Canon Law as a semi-public Oratory.

The premises were valued at £112 10*s.* 0*d.*

Mr. T. J. Campbell, who opened the case, cited the following cases :—*Londonderry Guardians v. Londonderry Bridge Commissioners*, I.R. 2 C.L. 577 ; *O'Neill v. Commissioner of Valuation*, 1914, 2 I.R. 447 ; *Girls'*

Public Day School Trust, Ltd. v. Ereaut, 1931, A.C. 12; *Cardinal Vaughan Memorial School v. Ryall*, 36 T.L.R. 694; *The Good Shepherd Nuns v. Commissioner of Valuation*, 1930, I.R. 646; *Hall v. Derby Sanitary Authority*, 16 Q.B.D. 163. He also produced Lease, dated 18th January, 1886.

Canon John McLaughlin, Parish Priest of Cookstown, was examined. He stated the convent was occupied by the Sisters of Mercy and produced the Lease. They were employed in religious, educational and charitable purposes. The buildings had always been exempt up to the present time and were always used for charitable purposes only. There were no paying pupils and there was no source of income or profit in the convent nor can the convent be directed by the nuns to anything else.

The Cardinal Archbishop audits the accounts of the convent and the witness's duty as Parish Priest was to see that all the income was used entirely for charitable purposes.

The Public Elementary School attached to the Convent is exempt. The nuns do some charitable work outside the convent and thirteen of them teach in the School referred to.

Income Tax is refunded by the income tax authorities as the establishment is charitable in their opinion.

The Convent was the necessary means for the charitable work that was going on. The teaching nuns did not get salaries but were paid a capitation grant which goes to the Convent. They had no right to a pension.

The Acting County Court Judge confirmed the valuation but held that the premises being used exclusively for charitable purposes were to be distinguished by the Commissioner of Valuation in the Valuation List in pursuance of Sec. 2 of the Valuation (Ireland) Act, 1854, and gave the appellants their costs.

Warnock, K.C., *MacDermott, K.C.* and *Miller* for the Commissioner of Valuation :—

The test is whether the premises are used exclusively for charitable purposes. We submit that on the facts

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the Acting County Court Judge came to the wrong conclusion. The convent as such is not a charity.

In *Cocks v. Manners* (1), Sir John Wickens, V.C., said: "A voluntary association of women for the "purpose of working out their own salvation by "religious exercises and self-denial seems to me to "have none of the requisites of a charitable institution, "whether the word 'charitable' is used in its popular "sense or in its legal sense. It is said, in some of the "cases, that religious purposes are charitable, but "that can only be true as to religious services tending "directly or indirectly toward the instruction or the "edification of the public."

To secure exemption, the premises must be used exclusively for charitable purposes. It is not enough that this property should be clothed with a charitable trust.

We rely on *The Sisters of Mercy v. The Water Commissioners of Belfast* (2), where it was held that premises, as for instance a Convent, the institution and existence whereof are primarily for the purposes of conventual life, and the spiritual advancement of the inmates, and not being subsidiary or subordinate to the schools held therein, and not being simply the residence of the teachers, but something more, and not being essential for the imparting of education, are liable to be rated.

In *Commissioner of Valuation v. O'Connell* (3), Palles, C.B., said in his judgment that premises to be exempt "must be used" and "used exclusively" for charitable purposes. Any use of such premises by a person who is not an object of the charity is to my mind "a private profit or use . . . directly derived "therefrom" within 1 & 2 Vict., c. 56, s. 63, and such profit or use, if it exists, prevents the premises being "used '*exclusively*' for charitable purposes."

In *Heron v. Monaghen* (4), it was held that a national school teacher's residence, which is separate and distinct from a national school, is not a building used for public purposes within the meaning of 1 & 2 Vict.,

(1) L.R. 12 Eq. 574, 585.
(2) 4 Ir. Jur. N.S. 270.
(3) [1906] 2 I.R. 479, 485.
(4) 22 L.R.I. 532.

c. 56, s. 63, and 15 & 16 Vict., c. 63, s. 16, and is liable to be rated for the relief of the poor.

In the present case, the work done by the members of the Community outside the Convent cannot determine the matter.

We rely on *McKenna v. Commissioner of Valuation* (1). In that case certain members of the Christian Brothers community taught in a school in the town of Carlow and resided in certain premises outside the town. In these premises one room was fitted up and used three times a week as a class room ; some of the other rooms had occasionally been used similarly. It was held that the premises were not used exclusively for charitable purposes, and therefore, were not exempt.

Doré v. The Commissioner of Valuation (2), very closely resembles the present case.

In that case premises were used as a monastery or residence for a community of friars bound by vows of poverty, and who were occupied solely in charitable work among the sick poor of the district.

It was held that the premises were not used exclusively for charitable purposes so as to be exempt.

We submit that in the present case there is a private profit or use. Nothing can be considered except what happens inside the premises. It is the actual use to which the hereditament itself is put that has to be considered. On this point we rely on *Moon v. London County Council* (3).

The members of this community join together for their own protection and the greater glory of God. There is nothing intrinsic in their work which requires them to live in this Convent building.

T. J. Campbell, K.C., and *McSparran* for the appellants :—

The primary object of the members of this community engaged in this charitable work is the good of the public. The direct objects are charitable. Every

(1) 49 I.L.T.R. 103.
(2) 50 I.L.T.R. 105.
(3) [1931] A.C. 151.

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phase of activity of this order is charitable. It is necessary to look at the outward manifestations of this particular order.

We rely on the *Dominican Training College case* (1).

The present case differs from the cases that have been referred to on behalf of the Commissioner of Valuation.

Cocks v. Manners (2) is clearly distinguishable from the present case.

The residence in the convent is ancillary to the work in the school. It is an element to be considered that the school was attached to the convent. The convent was used as a residence or base for charitable work. The test is not whether or not the work was done outside the convent.

The convent was a necessary means for the charitable work that was being performed.

We rely on *Hoope v. Griffith* (3), where it was held that premises appropriated, exclusively, to religious, educational, or charitable uses, as well as the portions of them occupied solely by the persons engaged in the effectuation of such uses, and in the occupancy whereof the residents have no beneficial interest, are exempt.

The members of the community went into these premises for the purpose of carrying out these charitable purposes.

Commissioner of Valuation v. O'Connell (4) is entirely different from the present case.

In *Heron v. Monaghen* (5), the school teacher's residence was separate and distinct from the school, and the school teacher paid rent for his residence.

Once the public got the benefit, the purpose is charitable.

It is perfectly clear that in the present case,the work of sanctification was carried out by works devoted to the public.

Doré v. Commissioner of Valuation (6) is distinguishable from the present case.

(1) Unreported.
(2) L.R. 12 Eq. 574.
(3) 4 Ir. Jur. N.S. 222.
(4) [1906] 2 I.R. 479.
(5) 22 L.R.I. 532.
(6) 50 I.L.T.R. 105.

The user of this convent building is charitable. The chapel is certainly devoted to charitable purposes. It is recognised by Canon Law as a semi-public Oratory.

The convent is the essential machinery by which the charitable work is carried on. All the essential elements of a charitable trust are present. This convent is affected with a charitable trust.

There is a strong resemblance between *Hoope v. Griffith* (1), and the present case.

We submit that the principle established in that case applies to the present case. This convent was built for charitable purposes. It is a necessary inference that the charitable work was done in the convent. It would be a strained construction to regard this building as merely a residence for the members of the community. We submit that the members of the community occupy a similar position to that occupied by nurses in a hospital.

We strongly rely on the words used by Lord O'Hagan in his judgment in *Hoope v. Griffith* (1).

In *Commissioner of Valuation v. O'Connell* (2), the residence was the dominant thing.

We rely on *The Commissioner of Valuation for Northern Ireland v. Fisherwick Church Trustees* (3).

In the present case, the public do use this chapel. No objection is taken, nor could be taken to their presence.

The work done is charitable, and the result is private sanctification.

We submit this convent is entitled to be exempt.

[They also referred to *The Sisters of Mercy v. The Water Commissioners of Belfast* (4), *McKenna v. Commissioner of Valuation* (5), *Good Shepherd Nuns v. Commissioner of Valuation* (6), *Portadown Urban Council v. Commissioner of Valuation* (7), and *O'Neill v. Commissioner of Valuation* (8).]

(1) 4 Ir. Jur. N.S. 222, 225, 226, 227.
(2) [1906] 2 I.R. 479.
(3) [1927] N.I. 76.
(4) 4 Ir. Jur. N.S. 270.
(5) 49 I.L.T.R. 103.
(6) [1930] I.R. 646.
(7) 38 I.L.T.R. 71.
(8) [1914] 2 I.R. 447.

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Warnock, K.C. (in reply):—

We submit that the present case comes under the principle laid down in *Doré v. Commissioner of Valuation* (1), *Commissioner of Valuation v. O'Connell* (2), and *McKenna v. Commissioner of Valuation* (3).

In *McKenna v. Commissioner of Valuation* (3), Madden, J., said in his judgment, referring to *Commissioner of Valuation v. O'Connell* (2): "That case "was decided upon the general principle that if "premises are used substantially as a residence they "are liable to assessment, although the persons "residing in the building use it for the discharge of "charitable duties."

We submit that general principle applies to the present case. A base from which charitable work is carried on is not exempt.

It is quite true that if it be necessary for the carrying on of the charity that some persons should reside in the building, such residence does not destroy the user for charitable purposes. That is quite different from the present case. The great bulk of the charitable work is carried on outside the building.

As to the chapel, we submit that it is not open in the present case stated to distinguish the chapel. There has been no request by the appellants to segregate the chapel.

We submit these premises are not entitled to exemption.

[He also referred to *Good Shepherd Nuns v. Commissioner of Valuation* (4).]

Sir William Moore, L.C.J.

Moore, L.C.J.: Mr. Justice Brown and I have come to a very clear agreement on the arguments put before us in this case, and we are very much indebted to counsel who produced many authorities. The case is pretty clear on the authorities.

The section requires "exclusive user" for the charitable purposes for which exemption was claimed. Here there is a charitable purpose for the poor of Cookstown, in pursuance of the terms of the lease

(1) 50 I.L.T.R. 105.
(2) [1906] 2 I.R. 479.
(3) 49 I.L.T.R. 103.
(4) [1930] I.R. 646.

under which the buildings are held. Public subscription had built the buildings.

The principle established in *Commissioner of Valuation v. O'Connell* (1), *McKenna v. Commissioner of Valuation* (2), and *Doré v. The Commissioner of Valuation* (3), applies to the present case.

That principle was stated by Palles, C.B., in his judgment in *Commissioner of Valuation v. O'Connell* (1), where he said that premises to be exempt "must be "'used' and 'used exclusively' for charitable pur- "poses: 15 & 16 Vict., c. 63, s. 16. Any use of such "premises by a person who is not an object of the "charity is, to my mind, 'a private profit or use . . . "'directly derived therefrom' within 1 & 2 Vict., c. 56, "s. 63, and such a profit or use, if it exists, prevents "the premises being used '*exclusively*' for charitable "purposes." This decision was again adopted by Palles, C.B., in *Doré v. The Commissioner of Valuation* (3).

No matter what good work these ladies were doing outside this convent in the cause of charity, there was no evidence that all this work or even the major portion of it, was done inside it. The user of the premises was mainly for a residence for the good ladies. It was residential in character, and, therefore, we hold not exempt. [Unrevised].

BROWN, J.: I concur, and have nothing to add.

Solicitor for the appellants: *J. D. Devlin.*

Solicitor for The Commissioner of Valuation: *J. H. B. Gunning.*

J. McC.

(1) [1906] 2 I.R. 479.
(2) 49 I.L.T.R. 103.
(3) 50 I.L.T.R. 105.

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Dec. 16. 1937.

Jan. 12.

TYRONE COUNTY COUNCIL v. THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND (1).

Valuation Acts—Rating—Exemption—Property "dedicated to or used for public purposes"—Quarry, offices, etc., used in connection with the upkeep of county public roads—Poor Relief (Ireland) Act, 1838 (1 & 2 *Vict.*, *c.* 56), *section* 63—*Valuation (Ireland) Act*, 1852 (15 & 16 *Vict.*, *c.* 63), *section* 12—*Valuation (Ireland) Act*, 1854 (17 & 18 *Vict.*, *c.* 8), *section* 2.

Exemption from rating was claimed for property which was used solely in connection with the upkeep of public roads, such as quarries, stores, etc.

The county council claimed that these premises being used solely in connection with the public roads in the county ought to be completely exempted from rating on the ground that they were all "used for public purposes."

The Commissioner of Valuation declined to exempt the premises and the county council appealed from his decision to the Acting County Court Judge who declared the premises not exempt and affirmed the decision of the Commissioner of Valuation, but stated a case for the opinion of the King's Bench Division.

It was held by Andrews, L.J., sitting in the King's Bench Division, that the premises could not be said to be dedicated to or used for public purposes as the members of the public had no right to enter or use them, and that the claim to exemption therefore failed.

He held also, that the claim failed on the further ground that a private profit or use was directly derived from the premises.

The Tyrone County Council appealed to the Court of Appeal.

Held, by the Court of Appeal (Best, L.J., and Brown, J.), affirming the decision of Andrews, L.J., that there was such a private use of the premises by the county council on behalf of the ratepayers as to render the county council liable to be rated as occupiers, and that the claim for exemption therefore failed.

APPEAL from a decision of Andrews, L.J., on a case stated for the opinion of the King's Bench Division in Northern Ireland by the Acting County Court Judge for County Tyrone.

The material facts and arguments, as appearing from the case stated, were as follows :—

(1) In the Court of Appeal before BEST, L.J., and Brown, J.

The following five cases were selected by both parties and came before me for hearing at Dungannon, on Friday, 14th February, 1936. By arrangement between the litigants, all were heard together and it was stated that their decision would govern a number of other cases. Each litigant asked, in the event of my decision being unfavourable, for a case stated. The facts in each case were agreed and a note thereof was handed in to me at the commencement of the hearing. I accordingly incorporate them in the present case.

No. of Appeal.	*District.*	*Electoral Division.*	*Valuation Office No.*	*Description*
18	Cookstown Rural	Orritor	153	Quarry.
20	Cookstown Rural	Orritor	327	Right of way to quarry.
22	Cookstown Rural	Stewartstown	225–1	Store.
69	Dungannon Urban	Central Ward	80	Co. Surveyor's Office.
74	Dungannon Rural	East Ward	90	Workshop and Store.

E. S. Murphy, K.C. (instructed by *John F. Dickie*) :

The five cases were all of premises used for public purposes. The Council claimed complete exemption for them as being used solely in connection with the upkeep of the roads in County Tyrone. He quoted the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict., c. 56), s. 63, " hereditaments dedicated to or used for Public " Purposes."

He also cited the Valuation (Ireland) Act, 1852 (15 & 16 Vict., c. 63), s. 12, and the Valuation (Ireland) Act, 1854 (17 & 18 Vict., c. 8), s. 2.

He referred to the *Mersey Docks and Harbour Board Trustees v. Cameron* (1), to *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (2), and to the *Cork Corporation v. Commissioner of Valuation* (3).

(1) 11 H.L. Ca. 443.
(2) I.R. 2 C.L. 577.
(3) [1916] 2 I.R. 77.

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J. C. MacDermott, K.C. (instructed by *John F. A. Simms*), for the Commissioner of Valuation :—

The practice has always been to rate all premises ancillary to public purposes. The Council are not entitled to exemption on the grounds that premises used for purposes ancillary to property used for public purposes should be exempt. No member of the public could get into the premises of the Council as of right and accordingly such premises were not premises dedicated to the public use. The premises were used for the legal duty of the Council and were not exempt.

E. S. Murphy, K.C. (in reply) :—

The Council were under a statutory duty to maintain the public roads. The repair of a public highway was in itself a public purpose, and therefore the use of a quarry was for public and no other purposes. The claim of the County Council was in respect of hereditaments used exclusively for road repair.

The Acting County Court Judge found in favour of the Commissioner of Valuation and declared the premises not exempt and allowed the Commissioner of Valuation his costs in each case."

Murphy, K.C., and *Dougherty* for Tyrone County Council :—

We rely on *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (1), where it was held that the tolls and toll-houses were hereditaments " dedicated to, or used for public purposes," within the meaning of the Irish Poor Law Act (1 & 2 Vict., c. 56), s. 63 ; and that therefore the Bridge Commissioners were not liable to be rated to the relief of the Poor in respect of such tolls and toll-houses.

We submit that the present case cannot be distinguished from the *Londonderry Bridge Case* (1). We rely on the words used by O'Hagan, J., in his judgment in that case, at pages 582, 583, 584 and 585. At page 585, he says, " we shall see that the church,

(1) I.R. 2 C.L. 577.

"the school and the hospital, are all exempted because "in their several ways they are used for the public "benefit of the whole community, and not for the "private or exclusive use of any members of it; and "when we find a building or hereditament used in a "like manner, though not described under any of the "special categories of exemption, we may safely say "that it is a building or hereditament so dedicated "and used, so as to be free from rateability."

As was pointed out by O'Hagan, J., in his judgment in *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (1), the law in Ireland is quite different from the law in England. A quarry that is used exclusively for the purposes of the roads is just as much "used for public purposes" as the roads themselves. The present case is quite different from cases dealing with school teachers' residences, such as *Heron v. Monaghen* (2).

The present case affects a very limited and very definite class of hereditaments, the use of which is not in dispute. The maintenance of the roads in County Tyrone is a public purpose.

In *Mersey Docks and Harbour Board Trustees v. Cameron* (3), the House of Lords held that it was only property in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, that was not rateable, but this decision is not applicable to Ireland, and to the Irish Poor Rate.

We rely on the words used by Fitzgerald, B., in his judgment in *The Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (1), where he said: "In my opinion, the maintenance of a public "highway for all the Queen's subjects is a public "purpose."

We also rely on *The Commissioner of Valuation v. Sligo Harbour Commissioners* (4), where the Court of Appeal held that the property of the Sligo Harbour Commissioners was "dedicated to or used for public

(1) I.R. 2 C.L. 577, 591, 592.
(2) 22 L.R.I. 532.
(3) 11 H.L. 443.
(4) [1899] 2 I.R. 214.

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"purposes," and was within the exemption of the Valuation Acts. That case followed the *Guardians of the Londonderry Union v. The Londonderry Bridge Commissioners* (1).

We also rely on *Belfast Harbour Commissioners v. Commissioners of Valuation* (2), where it was held that the property of the Belfast Harbour Commissioners must be held to be "dedicated to or used for public "purposes" and within the exemption of the Valuation Acts as interpreted by the *Londonderry Bridge Case* (1).

The test is, for what purpose is the quarry being used? The quarry is in the same position as a "lie-"by," on the public road. A "lie-by" is not in itself any more essential than the quarry in the present case. If the hereditament is being used for a public purpose it is exempt.

We submit that *Moon v. London County Council* (3), a decision under the Derating Acts is no authority for the present case.

On all these grounds, the County Council is entitled to exemption.

[They also referred to *Corporation of Cork v. Commissioner of Valuation* (4).]

MacDermott, K. C. and *Miller* for the Commissioner of Valuation :—

The introduction of a "lie-by" amounts to drawing a red herring across the highway. The County Council is attempting to vary the practice of the last hundred years.

All that the *Londonderry Bridge Case* (1) decided was that if a hereditament was one in which every member of the public had an interest, then section 2 of the Act of 1854 ought to be applied, and exemption followed.

This quarry is used for the purpose of supplying stones for the county roads, and it ought to be valued as a hereditament used for that purpose.

(1) I.R. 2 C.L. 577, 597.
(2) [1897] 2 I.R. 516.
(3) [1931] A.C. 151.
(4) [1916] 2 I.R. 77.

We say that this quarry is not used for "public "purposes." The test is, has every member of the public an interest in the hereditament ?

We rely on *Mayor of Limerick v. Commissioner of Valuation* (1), where it was held that the gas works belonging to the Corporation of Limerick were not occupied for a "public purpose," and were not, therefore, exempt from being rated.

In that case Fitzgerald, J., said in the course of his judgment at page 432 : "But even the *Londonderry* "*Bridge Case* (2), shows that the public purpose must "be one in which every member of the community "has an interest." The same view was expressed by Barry, J., at page 435, and by Gibson, J., in *Belfast Harbour Commissioners v. Commissioner of Valuation* (3).

We also rely on the words used by Holmes, L.J., in his judgment in *Commissioner of Valuation v. Sligo Harbour Commissioners* (4).

We submit that the principle established in *Heron v. Monaghen* (5), applies to the present case.

The word "exclusively" used in section 12 of the Valuation (Ireland) Act, 1852, points to one particular hereditament.

It was never intended that these sections of the Valuation Acts dealing with public purposes should be applied to such hereditaments as quarries.

In *In re Reference under the Government of Ireland Act*, 1920, *and Sect.* 3 *of The Finance Act* (*Northern Ireland*), 1934 (6), Lord Thankerton, in delivering the judgment of the Privy Council, said : "the poor rate is "levied in respect of the occupation of hereditaments, "irrespective of a person's income generally, and "irrespective of whether the ratepayer is in fact "deriving profits or gains from such occupation."

The question is, how are the premises used ?

Moon v. London County Council (7), is relevant to the present case. In that case it was held that in determining whether a hereditament occupied and used

(1) I.R. 6 C.L. 420.
(2) I.R. 2 C.L. 577.
(3) [1897] 2 I.R. 516, 529.
(4) [1899] 2 I.R. 214, 229.
(5) 22 L.R.I. 532.
(6) [1936] A.C. 352, 359.
(7) [1931] A.C. 151.

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as a factory is primarily occupied and used for purposes which are not those of a factory, it is the actual use to which the hereditament itself is put that has to be considered, and not the use to be made of the products of the hereditament or of the work there carried on.

We rely on the words used in *Moon v. London County Council* (1), by Lord Warrington of Clyffe.

We submit that *Moon v. London County Council* (1) is *in pari materia* with the present case.

The principle established in *London County Council v. Churchwardens of Parish of Erith and Assessment Committee of Dartford Union* (2), that the true test of beneficial occupation was not whether a profit could be made but whether the occupation was of value, applies to the present case. In his speech in the House of Lords in that case, Lord Herschell, L.C., said : " But I " must demur to the view that the question whether " profit (by which I understand is meant pecuniary " profit) can be derived from the occupation by the " occupier is a criterion which determines whether the " premises are rateable, and at what amount they " should be assessed."

It is not necessary to show a profit, a use, as was pointed out by Andrews, L.J., in the judgment appealed from is all that is necessary.

The County Council is providing this quarry for the purpose of carrying out their legal duties and we say that in doing so, they are making a private profit or use.

Murphy, K.C. (in reply) :—

The quarry is property used solely in connection with the upkeep of the roads in County Tyrone.

The position of the toll houses in the *Londonderry Bridge Case* (3) cannot be distinguished from the position of the quarry in the present case.

This quarry, on the agreed facts, is used solely for a public purpose, as it is admitted that the maintenance of the public roads is a public purpose.

[He referred to *Moon v. London County Council* (1).

Cur. adv. vult.

(1) [1931] A.C. 151, 171, 172.
(2) [1893] A.C. 562, 591.
(3) I.R. 2 C.L. 577.

BEST, L.J., delivered the judgment of the Court as follows :—

This case, which has to do with the rateability of five separate hereditaments, was heard at Quarter Sessions on appeal by the County Council from the decision of the Commissioner of Valuation, who had declined to exempt the premises from rating on the claim made by the County Council that they are tenements of a public nature under 17 & 18 Vict., chapter 8, section 2. The learned Acting County Court Judge, E. J. McKean, Esq., K.C., found in favour of the Commissioner and declared that the premises in question are not exempt, and at the request of the County Council stated a case for the opinion of the King's Bench Divisional Court. Andrews, L.J., heard the case stated and upheld the decision of the Acting County Court Judge. From this decision the County Council have appealed, their contention being that the premises are altogether used for public purposes and are therefore entitled to the exemption claimed. The five separate hereditaments, the subject matter of the appeal, are fully described in the Case Stated and in the judgment of Andrews, L.J., and it is common ground between the parties that a decision as to the rateability or otherwise of the first of the hereditaments—the quarry—will govern the others.

The question turns on the true construction of the provisions of certain statutes, the first of which is the Poor Relief (Ireland) Act, 1838, 1 & 2 Victoria, chapter 56. Section 63 makes provision for the rateability of the hereditaments therein mentioned and provides that others shall not be rateable, and in particular there is the proviso "nor shall any building, land or "hereditament dedicated to or used for public pur- "poses" be rateable "except where any private profit "or use shall be directly derived therefrom in which "case the person deriving the profit or use shall be "liable to be rated as an occupier according to the "annual value of such profit or use."

As pointed out by Andrews, L.J., the material words of the proviso are "any building, land, or heredita "ment dedicated to or used for public purposes . . .

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"except where any private profit or use shall be "directly derived therefrom."

The next Act to which reference need be made is the Valuation (Ireland) Act, 1852, 15 & 16 Vict., chapter 63, section 16 of which provides that no hereditaments or tenements or portions of the same shall be deemed to be of a public nature unless such hereditaments or tenements or portions of the same respectively shall be altogether of a public nature.

The next and final section to which reference is necessary is section 2 of the Valuation (Ireland) Act, 1854, 17 & 18 Vict., chapter 8, which exempts hereditaments of a public nature so long as they shall continue to be of a public nature and occupied for the public service.

In the judgment appealed from every case which has any bearing on the question at issue has been carefully dealt with, and it is accordingly unnecessary to traverse the ground once more, but we may be permitted to say that we agree with the deductions drawn by Andrews, L.J., from those cases and with his statement of the law as bearing on the matter now in dispute.

What we have to decide is whether the quarry, taking it as typical of the five hereditaments, has been dedicated to or is being used for public purposes within the meaning of section 63 of the Act of 1838. It is not suggested by Mr. Murphy for the County Council that there has been any dedication by that body of the quarry for public purposes, nor can we at present see under what possible authority or how such dedication could be effected. The County Council own the quarry and must have purchased it with money obtained from the ratepayers of the county, they are accordingly trustees of the quarry for the ratepayers and for them alone, and are not in a position to dedicate either the quarry itself or materials derived from it to the use of the public generally. Further, on the question of the public use of the quarry itself it is to be observed that it is not accessible to the public, it is not used for the public benefit of the whole community but is used for the benefit of the County

Council and those whom that Council represents, viz., the ratepayers of County Tyrone. If the quarry were not available for the raising of stones, some other means of providing stones for the upkeep and repair of the roads of the county must be found by the County Council, and if the latter were compelled, as they well might be, to purchase stones from owners of private quarries, the position and rights of members of the public generally would not be in any wise different from what they are under existing circumstances. The members of the public are at present in exactly the same position in respect of the quarry now in question as they would be in respect of a private quarry if the stones required for the maintenance of the roads were obtained from a quarry of that description. The County Council are under an obligation to keep the roads of the county in a proper state of maintenance, and so long as this is done the members of the public have no interest whatsoever in the source from which the materials necessary to effect that purpose have been drawn.

We cannot put the matter better than has been done by Andrews, L.J., where he says : " I regard this " quarry as something essentially different from a " public road or public bridge or a toll house established " on and an essential part of that public undertaking. " There is a public right vested in every subject of the " King to use the public highways of the Kingdom. " The same right, subject to the payment of tolls, " existed in the case of the Londonderry Bridge. On " the other hand, there is no right on the part of " any member of the public to enter or use the quarry " for any purpose whatever. Further, there is a duty " to maintain a public road and to preserve it for the " use of the public ; and the maintenance of a public " highway for all the King's subjects is a public " purpose. Such duty of maintenance or preservation " does not, however, extend to a quarry or other works " from which the road authority happens for the time " being to be obtaining stone or other material for the " maintenance of the road. A public road or public " bridge is, according to the ordinary meaning and

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"acceptation of the words 'dedicated to or used for "'public purposes.' Not so a quarry belonging to a "road authority which could be sold, abandoned, or "disused by such authority of its own volition, without "any interference with any right of any member of "the public."

The learned Lord Justice goes on to say that he is unable to accept Mr. Murphy's argument that because the maintenance of a highway is a public purpose, it follows that a hereditament from which material happens for the time being to be taken to enable this public purpose to be discharged, must itself be dedicated to or used for public purposes.

We, too, are unable to accept this argument, and we think it is unsound because it fails to distinguish between what is a public purpose and what are the means required to carry out such purpose. On this aspect of the question it may be of use to refer to the case of *Liskeard Union v. Liskeard Waterworks Co.* (1). There the matter in dispute was as to the rate to be charged by the Waterworks Co. to the Guardians of the Union for a supply of water to the inmates of a workhouse in the Union, the Waterworks Co. contending that the supply of water to the Union was for public purposes whilst the Guardians submitted that the supply was for domestic purposes and chargeable as such, under the 33rd section of the special Act, the Liskeard Waterworks Act of 1860. Lord Coleridge, C.J., in delivering judgment in favour of the Union, is reported at p. 508 to have used these words :—"It is "then said that the water supplied to a workhouse is "not supplied for domestic purposes within the meaning "of section 33 because the maintenance of paupers in "England is a public purpose. No doubt this is true, "but in the prosecution of that which is a public "purpose there may be domestic uses, and this is one." Here, although the maintenance of the paupers was held to be a public purpose, it was nevertheless also held that the supply of water to the workhouse in which they resided and wherein they were maintained was not a public purpose or use but that the use of

(1) 7 Q.B.D. 505.

such water was a domestic use and to be charged for as such.

This case illustrates what has been already referred to, that there is or may be a vital distinction between a public purpose and the means necessary to effect that purpose.

In the present case we think that the distinction is of importance. Every member of the public has an interest actual or potential in the maintenance of the highways in County Tyrone ; no member of the public save those paying rates in the county has any interest whatever in the source from which the materials are drawn for that maintenance, and even the ratepayers are only interested in so far as the County Council may save money by using materials taken from a quarry which they own. The use of the quarry can have no possible interest for members of the public other than those just mentioned, but there is, on the other hand, in our opinion, such a private use of it by the County Council on behalf of the ratepayers as to render the County Council liable to be rated as occupiers according to the annual value of such use on their part.

Having arrived at this conclusion, it becomes unnecessary to pronounce definitely in favour of Mr. MacDermott's argument that in determining the claim to exemption we should look only to the occupation and user of the hereditament itself and not outside the hereditament to what may be the ultimate object and purpose of the user. His argument appears to us to be a weighty one, but having come to the clear conclusion that the quarry is not used for public purposes, this is sufficient for the decision of the case.

In our opinion the judgment of the Lord Justice is right and the appeal will accordingly be dismissed with costs.

Solicitor for the Tyrone County Council : *John F. Dickie.*

Solicitor for The Commissioner of Valuation for Northern Ireland : *F. C. MacNeice.*

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it was unnecessary for the plaintiff to establish that the debt was actually extinguished, but that it was sufficient for him to show that the lien was merged and lost in the mortgage; *Held*, by the whole Court, that the plaintiff was entitled to succeed and that an order for the delivery up of the title deeds to him should be made. *Curry v. Rea.* .. .. C.A. 1

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INSURANCE (MOTOR)—ACCIDENT—Driver Insured—Voluntary Passenger injured—Right of Hospital to recover from Insurance Company *expenses reasonably incurred in treating voluntary passenger, injured by negligence of driver—Liability in respect of which no obligation to insure imposed by statute—Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1930 (20 & 21 *Geo.* 5, c. 24) *sections* 12 (1), 6 (1)—*Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, c. 15), *sections* 15, 45. D. H., a voluntary passenger not carried for hire or reward or by reason or in pursuance of a contract of employment) in A. C.'s private motor car, was injured in a collision between the car and an omnibus. He was taken to the R. V. Hospital where he remained for treatment for over two months as an intern patient. He sued A. C. and the owners of the omnibus for damages and recovered against A. C., the claim against the omnibus being dismissed. No claim was made for hospital expenses. The R. V. Hospital sued for these expenses the insurers of A. C., who had, pursuant to A. C.'s policy, paid the amount of the judgment and the Recorder of B. dismissed the civil bill. The R. V. Hospital appealed and Best, L.J., stated a case for the opinion of the Court of Appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ., Moore, L.C.J., dissenting), that as the defendants were "authorised insurers" who had made a payment in respect of the voluntary passenger's injury under a policy issued under Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, they were bound by the terms of section 12 (1) of that Act, to pay also the plaintiff's expenses of the voluntary passenger's treatment in the hospital. *Royal Victoria Hospital v. The London Guarantee and Accident Corporation. Ltd.* .. .. .. C.A. 64

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LEGITIMATION—Domicile—Person who had lived in that part of Ireland now Northern Ireland—*Whether domiciled in Northern Ireland—Legitimacy Act (Northern Ireland)*, 1928 (18 & 19 *Geo.* 5, c. 5), *section* 1 (1). Section 1 (1) of the Legitimacy Act (Northern Ireland), 1928, provides that "subject to the provisions of this "section, where the parents of an "illegitimate person marry or have "married one another, whether before "or after the commencement of this "Act, the marriage shall, if the father

" of the illegitimate person was or is " at the date of the marriage domiciled " in Northern Ireland, render that " person, if living, legitimate from the " commencement of this Act, or from " the date of the marriage, whichever " last happens." Plaintiff was born on 23rd March, 1890. Subsequently, on 14th March, 1907, her parents married one another. Plaintiff's father who had been born and had lived all his life in the County of Antrim, died on 26th February, 1915. M., who was a sister of plaintiff's father died on 17th February, 1936, intestate and unmarried. The said M.'s next-of-kin consisted of the children of brothers and sisters who had predeceased her. *Held*, that the words " domiciled in Northern Ireland " in the said section should be interpreted as " domiciled in that portion of Ireland " which is now Northern Ireland," and consequently that the plaintiff was entitled to take an interest in the estate of M. *In re M.* .. CH.D. 151

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LOCAL GOVERNMENT—RIGHT OF LOCAL AUTHORITY TO ENTER UPON LANDS OUTSIDE ITS DISTRICT, *for the purpose of measuring, making plans and taking levels, to ascertain suitability of lands for acquisition under Public Health (Ireland) Act*, 1878, *as site of reservoir for water supply—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict., c.* 52), *sections* 271, 35, 61 (2), 64 *—Public Health (Ireland) Act*, 1896 (59 & 60 *Vict., c.* 54), *section* 2. A local urban authority desired to enter lands outside its district and to make borings, for the purpose of measuring, surveying, making plans, and taking levels, to ascertain whether the lands were suitable to be acquired by them as the site of a new reservoir in connection with the water supply of their district. The justices had made an order that the defendants were to admit the plaintiff authority to enter upon the lands for such purposes. The defendants, however appealed to the County Court Judge, who held that section 271 of the Public Health (Ireland) Act, 1878, under which the application was brought, did not apply to lands outside the district of the authority. He allowed the appeals, but stated a special case for the opinion of the King's Bench Division as to whether he was right in holding as he did. *Held*, by the King's Bench Division, (Moore, L.C.J., and Brown, J.), that the County Court Judge was right in holding that section 271 of the Public Health (Ireland) Act, 1878, did not enable the plaintiffs to enter upon lands outside their district. *Portrush U.D.C. v. Mairs and Sloan* K.B.D. 44

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MINES AND MINERALS—RESERVATION OF—KIESELGUHR—*Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *section* 13 (3) (*c*), *section* 99—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34), *section* 16 (1), (2)—*Whether Kieselguhr a mineral or a clay.* The owner of the C.-C. Estate applied to the Land Purchase Commission, under section 16 of the Northern Ireland Land Act, 1925, for an order that the mineral rights on the holdings comprised in Provisional List No. 623, and especially the right to the substance known as Kieselguhr, should be excepted on the vesting of the holdings in the Commission and should not be affected by such vesting. Upon this estate there were very substantial deposits of the mineral clay known as Kieselguhr, or Diatomite, and the object of the application was to secure to the owner these very valuable deposits. The greater part of the settled estates which adjoined these holdings had been previously sold through the Land Commission, and on such sale the mineral rights on the holdings were reserved to the owner. Kieselguhr was being mined on adjoining lands forming part of the same estate by a Company under a sub-lease from the owner's predecessor in title. A minimum rent of £200 was being paid under

the sub-lease for the right to mine Kieselguhr on 67 acres 3 roods 16 perches. This working or developing was upon holdings let on fee farm grants and therefore excluded from the Northern Ireland Land Act, 1925, but it was upon the same estate. The whole estate had been settled or enjoyed as one property. Kieselguhr had therefore been worked or developed by the owner at the time of sale. The proper name of Kieselguhr is Diatomite and it is classed as a mineral in standard works on geology. Expert evidence was given on behalf of the owner that it is formed by accumulation of the outer hard parts of unicellular plants, which are secreted as a protective covering. Evidence was also given that it was altogether different from clay, having important uses in various industries such as an absorbent of nitro-glycerine, in polishing powders, in the manufacture of water glass, in abrasive soaps, in lagging steam pipes, as packing in refrigerators, as an absorbent for liquid manures for fertilisers, and as discs for gramophone records. *Held*, by Megaw, K.C., Judicial Commissioner, that Kieselguhr is a mineral within section 13 of the Irish Land Act, 1903, and that the rights to it, possessing a substantial value, and there being a reasonable prospect of them being worked, should be reserved to the owner on the vesting of the holdings in the Land Commission. *Estate of Marion Caroline Dehra Chichester-Clark.* .. L.P.C. 98

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MOTOR OMNIBUSES—USED BY HOTEL PROPRIETOR *partly for Conveyance of Hotel Guests and partly for Tours—Whether "Road Motor Undertaking"—Road and Railway Transport Act (Northern Ireland)*, 1935 (25 & 26 *Geo.* 5, *c.* 15), *sections* 5 (1), 5 (3) (*a*), 15 (1), 15 (4) (*f*). Section 5 (1) of the Road and Railway Transport Act (Northern Ireland), 1935, made it the duty of the Northern Ireland Road Transport Board, within a period of six months from the day on which the said Act came into force, to acquire every road motor undertaking operated for hire or reward in Northern Ireland. Section 15 (1) provided that a person, other than the Board, should not use a motor vehicle on any public highway for the conveyance of passengers for hire or reward except with the consent in writing of the Board and the approval of the Ministry of Home Affairs. Section 15 (4) (*f*) provided that this section should not apply to the use of a motor vehicle by the proprietor of an hotel for the conveyance of hotel guests and their luggage to or from the hotel from or to a railway station, quay or aerodrome. The plaintiff, who was the proprietor of two hotels, owned two motor omnibuses which were reserved entirely for hotel guests, and which he had used partly for the purpose of conveying hotel guests to and from his hotels, from and to Larne and Belfast, and partly in taking guests who came to his hotels upon inclusive week's tourist tickets, on advertised motor tours. *Held*, (Best, L.J., dissenting), affirming the decision of Megaw, J., in the Chancery Division, that such operation by the plaintiff of the said omnibuses did not constitute a road motor undertaking within the meaning of the Act. *Murphy v. Northern Ireland Road Transport Board* .. C.A. 22

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PRACTICE—WITHDRAWAL OF APPEAL—REVOCATION OF WITHDRAWAL. The P. Urban District Council, having given notice of an appeal against an order made by the King's Bench Division, wrote to the respondents stating that they had decided to withdraw their appeal. The respondents assented to the withdrawal. Subsequently the solicitors for the appellants wrote purporting to cancel their withdrawal of the appeal, and

stated that they intended to proceed with the appeal. *Held*, by the Court of Appeal (Andrews and Best, L.JJ.) that the appellants had no power to revoke their withdrawal of the appeal, and that the appeal could not be heard. *Portrush U.D.C. v. Mairs and Sloan* (*No.* 2) .. .. C.A. 52

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REVENUE—Income Tax—*Association existing for the purpose of carrying on research in the linen industry—Whether entitled to exemption granted to charities—Appeal from decision of Special Commissioners refusing exemption—Jurisdiction of Recorder to hear appeal—"Exemption"—The Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sections* 37, 40, 195, 196, 202—*The Finance Act*, 1921 (11 & 12 *Geo.* 5, *c.* 32), *section* 30—*The Finance Act*, 1925, (15 & 16 *Geo.* 5, *c.* 36), *section* 19 —*Marginal Note.* The appellants applied to the Commissioners of Inland Revenue under section 37 of the Income Tax Act, 1918, for exemption from income tax in respect of the financial year ending 5th April, 1934, on the ground that the Association was established for charitable purposes only. The Commissioners refused the claim and the appellants appealed to the Special Commissioners who also refused the claim. The Special Commissioners found as a fact that in the main the objects of the Association were to benefit the Linen industry and that the Association was not established for charitable purposes alone. The appellants required the Special Commissioners to list an appeal before the Recorder ; this the Special Commissioners refused to do on the grounds that the Recorder had no juridsiction to hear the appeal under section 37 of the Income Tax Act, 1918, determined by them under section 19 of the Finance Act, 1925. The appellants then requested the Deputy Recorder to list the appeal and the Deputy Recorder provisionally listed it for argument on the preliminary question as to whether or not he had jurisdiction to hear it. The Deputy Recorder held that he had jurisdiction. The Commissioners of Inland Revenue then obtained a conditional order of prohibition, forbidding the Deputy Recorder to hear the appeal, and the case then came before the King's Bench Division on motion to make the conditional order absolute. *Held*, by the King's Bench Division (Best, L.J., and Brown, J.), that the Deputy Recorder was wrong in holding that he had jurisdiction to hear the appeal from the decision of the Special Commissioners refusing exemption to the Association from income tax under the provisions of section 37 of the Income Tax Act, 1918, and that the provisions of section 202 of that Act do not enable an appeal by re-hearing to be made to the Deputy Recorder. The conditional order was therefore made absolute. *Linen Industry Research Association and Commissioners of Inland Revenue*, .. K.B.D... 159

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VALUATION ACTS (3)—Rateable Premises—Dwelling House, Offices and Lands—Dwelling House vacant—*Whether Hereditaments could be separately valued—Unit of Valuation—Valuation (Ireland) Act*, 1852 (15 & 16 *Vic.*, c. 63), *sections* 11 *and* 12—*Valuation Acts Amendment Act (Northern Ireland)*, 1932 (21 & 22 *Geo.* 5 c.26), *section* 6. The respondent held premises consisting of a dwelling-house, offices and lands, the lands constituting the more important part of the hereditament. The lands were valued by the Commissioner of Valuation at £233, the dwelling-house at £36 15*s.* 0*d.*, and other hereditaments

at £60, a total of £329 15*s.* 0*d.* The premises were all held under one title. The respondent appealed from the decision of the Commissioner of Valuation to the County Court Judge. He asked in his notice of appeal that the valuation of £60 placed on the dwelling-house should be put and shown as a separate unit on a separate line in the List of Valuations. The County Court Judge found as a fact that the dwelling-house was vacant. The County Court Judge held that by virtue of section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, the valuation of £60 placed on the dwelling-house should be distinguished in the Valuation List as a separate unit of valuation, and should be entered on a separate line, but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Andrews, L.J., and Brown, J.), that the principle underlying the decision of the Court in *Switzer v. Commissioner of Valuation* ([1902] 2 I.R. 275) applied as the premises included in the valuation under appeal were held by the respondent under one title, and that the hereditaments could not be separately valued: *Held, further*, that section 6 of the Valuation Acts Amendment Act (Northern Ireland), 1932, had not effected a change in the unit of valuation. *Leader v. The Commissioner of Valuation for Northern Ireland.* .. .. .. K.B.D. 57

VALUATION (2)—RATES—POOR RATE—EXEMPTION—HEREDITAMENT OF A "PUBLIC NATURE"—"USED FOR PUBLIC PURPOSES"—*Sheep Dipping Station erected under the provisions of the Diseases of Animals Act*, 1894 (57 & 58 *Vic.*, c. 57)—*Sheep Dipping (Northern Ireland) Order*, 1932, *No.* 32, *Arts.* 7, 13, 17—*Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vic.*, c. 56), *section* 63—*Valuation (Ireland) Act*, 1852 (15 & 16 *Vic.*, c. 63), *section* 16—*Valuation (Ireland) Amendment Act*, 1854 (17 & 18 *Vic.*, c. 8), *section* 2—*Valuation Acts Amendment Act (Northern Ireland)*, 1932 (21 & 22 *Geo.* 5, c. 26), *section* 3. The respondents established a sheep dipping station under Article 16 of the Sheep Dipping (Northern Ireland) Order of 8th April, 1932, made under the provisions of the Diseases of Animals Act, 1894, which empowers a local authority with the approval of the Ministry of Agriculture to provide, fit up and maintain sheep dipping places. Under the said order sheep dipping is compulsory, and the hereditament was established as a dipping station to facilitate compliance with this duty, though it was not compulsory for persons owning or having charge of sheep to dip them in this particular place. The owners or persons in charge were responsible for the dipping of their own sheep under the supervision of an inspector employed by the respondents. A charge of one penny for each sheep dipped was made but the revenue produced by this charge was insufficient to meet the expenses of the station. Various articles of the said order made restrictions on the movement of sheep and the time when they might be dipped. *Held*, reversing the decision of the Recorder of Londonderry, that the sheep dipping station was not a hereditament of a public nature nor used for public purposes so as to be exempt from poor rate. *Commissioner of Valuation v. County Council of Londonderry* .. K.B.D. 141

VALUATIONS (1)—RATES—POOR RATE—EXEMPTION—HEREDITAMENT OF A "PUBLIC NATURE"—"USED "FOR PUBLIC PURPOSES"—*Hall—Association for improving the Conditions and Amenities of Rural Life—Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vic.*, c. 56), *section* 63—*Valuation (Ireland) Act*, 1852 (15 & 16 *Vic.*, c. 63), *section* 16—*Valuation (Ireland) Amendment Act*, 1854 (17 & 18 *Vic.*, c. 8), *section* 2—*Valuation Acts Amendment Act (Northern Ireland)*, 1932 (21 & 22 *Geo.* 5, c. 26), *section* 3. A Hall used and occupied by the Women's Institute of Garvagh was held by the respondent as trustee for the said Institute. The Institute was an association of women formed with the object of improving the conditions and amenities of rural life. The membership of the Institute was confined to women and girls over fifteen years of age, who had to be proposed and seconded by members of the Institute before being elected. Each member paid a subscription of two shillings per annum. The Hall was provided primarily for the women of Garvagh district but there were members who resided in other districts. Dances and dramatic entertainments were held to which the public were

admitted on payment of an entrance fee. Badminton was played two nights a week and the badminton club was open to the public on the payment of a separate subscription. The Hall was not used by the members for any private purpose. *Held*, reversing the decision of the Recorder of Londonderry, that the Hall was not a hereditament of a public nature nor used for public purposes so as to be exempt from poor rate. *The Commissioner of Valuation v. McCausland* . K.B.D. 132

VALUATION ACTS (4)—RATING—EXEMPTION—PREMISES USED EXCLUSIVELY FOR CHARITABLE PURPOSES——*Members of Religious Community living in Convent and engaged in religious, educational and charitable work outside convent—Poor Relief (Ireland) Act*, 1876 (1 *&* 2 *Vict.*, c. 56), *section* 63—*Valuation (Ireland) Act*, 1852 (15 *&* 16 *Vict.*, c. 63), *section* 16. A convent was erected by the Roman Catholic inhabitants of the parish of C., and from 6th November, 1890, the members of the Religious Order known as the Sisters of Mercy had been in occupation and had been performing their duties for the benefit of the poor of the Parish. The buildings had always been exempt from rating, as also was the public elementary school attached to the convent. The community numbered sixteen ; of these thirteen were engaged in working for the poor, teaching the Catechism and instructing girls over school age, and teaching in the public elementary school. The remaining three were engaged in domestic work. The members of the community also superintended the work of the Sacristan in the Roman Catholic Church. The Chapel in the Convent was normally used only by the members of the community, but was not restricted solely for their use as members of the public occasionally attended. The work done by the members of the community was mainly outside the convent. The premises were valued by the Commissioner of Valuation at £112 10*s*. 0*d*. The appellants appealed to the Acting County Court Judge of T. They asked in their notice of appeal that the convent should be distinguished in the valuation list as being used for charitable purposes and should be exempt. The County Court Judge confirmed the valuation but held that the premises being used exclusively for charitable purposes should be distinguished by the Commissioner of Valuation in pursuance of section 2 of the Valuation (Ireland) Act, 1854, and should be exempt. He, however, stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the premises were not used exclusively for charitable purposes, and were therefore not exempt. *McLaughlin & Cosgrove v. Commissioner of Valuation for Northern Ireland.* .. .. K.B.D. 174

VALUATION ACTS (5)—RATING—EXEMPTION—PROPERTY "DEDICATED TO OR USED FOR PUBLIC PURPOSES"—*Quarry, offices, etc., used in connection with the upkeep of county public roads—Poor Relief (Ireland), Acts* 1838 (1 *&* 2 *Vict.*, c. 56), *section* 63—*Valuation (Ireland) Act*, 1852 (15 *&* 16 *Vict.*, c. 63), *section* 12—*Valuation (Ireland) Act*, 1854 17 *Vict.*, c. 8), *section* 2. Exemption from rating was claimed for property which was used solely in connection with the upkeep of public roads, such as quarries, stores, etc. The county council claimed that these premises being used solely in connection with the public roads in the county ought to be completely exempted from rating on the ground that they were all "used for public purposes." The Commissioner of Valuation declined to exempt the premises and the county council appealed from his decision to the Acting County Court Judge who declared the premises not exempt and affirmed the decision of the Commissioner of Valuation, but stated a case for the opinion of the King's Bench Division. It was held by Andrews, L.J., sitting in the King's Bench Division, that the premises could not be said to be dedicated to or used for public purposes as the members of the public had no right to enter or use them, and that the claim to exemption therefore failed. He held also, that the claim failed on the further ground that a private profit or use was directly derived from the premises. The Tyrone County Council appealed to the Court of Appeal. *Held*, by the Court of Appeal (Best, L.J., and Brown, J.), affirming the decision of Andrews, L.J., that there was such a private use of the premises by the county council on behalf of the ratepayers as

to render the county council liable to be rated as occupiers, and that the claim for exemption therefore failed. *Tyrone County Council v. The Commissioner of Valuation for Northern Ireland* .. .. .. C.A. 184

VALUATION—UNIT OF—*Dwelling House, Offices and Lands* .. 57
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VALUATION ACTS (6)—UNDERTAKING—*Hereditaments in various Townlands — Directly and indirectly profitable Hereditaments—Receipts and Expenditure Basis—Present Replacement Cost Basis—Beneficial Occupation —Valuation (Ireland) Act*, 1852 (15 & 16 *Vic., c.* 63), *sections* 11 *and* 12—*Valuation Acts Amendment Act (Northern Ireland)*, (21 & 22 *Geo.* 5, *c.* 26), *section* 6. A number of water undertakings had been constructed or acquired by the E. Rural District Council or their predecessors, and had been carried on under the provisions of the Public Health (Ireland) Acts. The Commissioner of Valuation had fixed a definite sum as the proper valuation of each of these various undertakings. The Council appealed from the decision of the Commissioner of Valuation to the County Court Judge of F. No water rate was struck and no water rents were charged to defray the annual expenditure, which was provided for out of the general rates levied for sanitary purposes. No separate accounts were kept for any of these undertakings, and no accounts were made up or produced showing expenditure and receipts for the undertakings either collectively or separately. The Council were precluded from making a profit on the undertaking, and, in fact, made no profit. As no accounts showing receipts and expenditure in respect of the undertakings were available the Commissioner had been unable in making the valuations, to follow the "receipts and expenditure" method and had based his valuation on an estimate of the present replacement cost of each undertaking. He then took two per cent. of this as representing the annual value of the undertaking as a whole and apportioned this between the various rating units in which the undertakings lay. On behalf of the Commissioner of Valuation it was contended (*a*) that valuation did not depend upon pecuniary profit or upon whether or not the Council were at liberty to make a pecuniary profit; (*b*) that they could properly be regarded as hypothetical tenants; (*c*) that to them as such tenants the hereditaments with their substantial capital value and utility were worth a yearly rent and could not be valued at "Nil"; (*d*) that had a "receipts and expenditure" valuation been practicable the receipts from rates would naturally have exceeded the expenditure as loan charges which were not a tenant's obligation could not be regarded as expenditure. The County Court Judge decided that the Council did not in fact and being a Sanitary Authority could not legally make any profit out of the undertakings and that since the decision of the House of Lords in the *Port of London Authority v. The Assessment Committee of Orsett Union* [1920] A.C. 273, the decisions in *Corporation of Worcester v. Droitwich Assessment Committee*, 2 Ex. D. 49, and *Mayor of Peterborough v. Stamford Union*, 31 W.R. 949, which, in his opinion ruled the case, must be regarded as good law. He ordered that the valuations should all be reduced to Nil, but stated a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division, (Moore, L.C.J., and Brown, J.), that the County Court Judge was wrong in marking the valuation as nil, and that it should have been valued at the agreed figures, as the occupation was of value, even though non-producing. *Enniskillen R.D.C. v. The Commissioner of Valuation for Northern Ireland.* .. .. K.B.D. 86.

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WILL DESTROYED BUT NOT REVOKED—*Wills Act*, 1837 (*Vict., c.* 26), *section* 20—*No evidence of contents—Form of order on grant of administration.* A will had been destroyed by direction of the testatrix but not in her presence. She died without making another will. No copy of the will was forthcoming and